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Finally Freed or Infinitely Detained? The Need for a Clear Standard of Finality for Reinstated Orders of Removal

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FINALLY FREED OR INFINITELY DETAINED? THE NEED FOR A CLEAR STANDARD OF FINALITY FOR REINSTATED ORDERS OF REMOVAL

Abstract: Circuits are currently split as to whether reinstated orders of removal are final orders of removal. The resolution of this circuit split and related legislative ambiguity has far-reaching implications for the rights of the 150,000 or more unauthorized immigrants who enter the United States each year. Reinstated orders of removal are a means by which the United States government can more rapidly deport individuals who reenter the country after having been previously deported. On July 29, 2016, in *Guerra v. Shanahan*, the United States Court of Appeals for the Second Circuit declared that reinstated orders of removal are not final orders of removal. As a result of that decision, the Second Circuit recognized that individuals detained under reinstated orders of removal have the right to a bond hearing. In contrast, on July 7, 2017, in *Padilla-Ramirez v. Bible*, the United States Court of Appeals for the Ninth Circuit determined that reinstated orders of removal are final orders of removal. The Ninth Circuit's decision therefore rejected the proposition that individuals subject to reinstated orders of removal are entitled to a bond hearing. This Note argues that Congress should explicitly announce that reinstated orders of removal are not final orders of removal in order to safeguard the rights of individuals seeking protection in the United States. This Note further argues that, unless and until Congress acts on this issue, statutory and regulatory interpretation should lead future courts to the conclusion that reinstated orders of removal are not final orders.

INTRODUCTION

Deyli Noe Guerra first came to the United States from Guatemala in April 1998, fleeing death threats.[1] When Guerra fled to the United States, he did so without authorization and was detained by Immigration and Customs Enforcement (ICE) shortly thereafter.[2] After an immigration judge ordered Guerra

[1] Guerra v. Shanahan (*Guerra I*), No. 14-CV-4203, 2014 WL 7330449, at *1 (S.D.N.Y. Dec. 23, 2014), *aff'd*, Guerra v. Shanahan (*Guerra II*), 831 F.3d 59 (2d Cir. 2016). Guerra's paternal uncle was threatening retribution against him after Guerra's cousin, who was pregnant with Guerra's child, committed suicide. *Id.*

[2] *See id.* (detailing Guerra's entry into the United States in April, and the entry of his order of removal in May of 1998). Entry without authorization, or, as it is known more colloquially, illegal immigration, is the process of entering the United States without some form of permission to enter the country. *See* Padilla-Ramirez v. Bible (*Padilla-Ramirez II*), 882 F.3d 826, 829 (9th Cir. 2017) (noting that an individual who was in the United States illegally had "entered the United States without apply-

removed in May of 1998, he was removed to Guatemala in April of 2009.[3] Upon his return to Guatemala, Guerra faced continued threats.[4] Fearful for his life, Guerra returned to the United States without authorization and was apprehended by ICE later in 2009.[5] ICE reinstated Guerra's prior order of removal, and he was removed to Guatemala in March of 2010.[6] Guerra then entered the United States for a third time, and was arrested in New York in May of 2013.[7]

After ICE became aware that Guerra had re-entered the country a second time, it again reinstated his prior order of removal and detained him.[8] While Guerra was detained, he expressed his fear of returning to Guatemala.[9] An asylum officer determined that Guerra had a reasonable fear of returning to Guatemala after conducting a reasonable fear interview.[10] Guerra's case was then transferred to an immigration judge to consider his eligibility for withholding of removal, a process by which he could avoid deportation by proving his life would be threatened in Guatemala.[11] While those proceedings were underway,

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ing for admission or parole"); *Guerra II*, 831 F.3d at 61 (noting that Guerra had entered the country without authorization).

[3] *Guerra I*, 2014 WL 7330449, at *1. Removal proceedings are the government's method of deporting individuals who do not have authorization to be in the United States. *See* 8 U.S.C. § 1229a (2012) (providing for the procedure the Attorney General uses to remove an unauthorized individual from the United States).

[4] *Guerra I*, 2014 WL 7330449, at *1. In addition to the continued threats from his paternal uncle, Guerra was also subject to threats from a gang member named Cachorro after Guerra started dating Cachorro's ex-girlfriend. Petitioner-Appellee's Brief at 7, *Guerra II*, 831 F.3d 59 (No. 15-504-cv). Guerra also faced threats from a group of drug traffickers who, having killed Guerra's maternal uncle while Guerra was in the United States, thought he had returned to Guatemala to avenge his uncle. *Id.* at 6–7.

[5] *Guerra I*, 2014 WL 7330449, at *1; *see infra* notes 59, 61–62. (explaining the role of Immigration and Customs Enforcement (ICE) in immigration matters).

[6] *Guerra I*, 2014 WL 7330449, at *1. Any individual who the government had previously removed from the United States, who reenters the country can be subject to a reinstated order of removal. 8 C.F.R. § 241.8(a) (2018). Reinstating a former order of removal is a more rapid way for the government to remove an individual and requires only that an ICE officer determine that there was a previous removal order that was issued, that the individual before them is the individual identified in that order, and that the individual reentered the United States. *Id.* § 241.8(a)(2)–(3).

[7] *Guerra I*, 2014 WL 7330449, at *1. State authorities arrested Guerra for driving while intoxicated. *Id.*

[8] *Id.*

[9] *See id.* (indicating that an asylum officer conducted a reasonable fear interview with Guerra, which requires that he first have alleged a fear of returning to Guatemala).

[10] *Id.* Asylum officers conduct reasonable fear interviews within ten days of an individual expressing a fear of removal to a specific country. 8 C.F.R. § 208.31(b). The interview is a nonadversarial proceeding, after which the asylum officer must decide whether the individual's fear is reasonable. *Id.* § 208.31(c). If the asylum officer decides that a person's fear is reasonable, then the immigrant's case is transferred to an immigration judge. *Id.* § 208.31(e). If the asylum officer decides that a person's fear is not reasonable, then that person can appeal the decision to an immigration judge. *Id.* § 208.31(g).

[11] *Guerra I*, 2014 WL 7330449, at *1. Withholding of removal is a form of relief that individuals can seek if they are facing "ordinary" or reinstated orders of removal, which allows them to avoid removal to a country where their life or freedom would be threatened. Kurtis A. Kemper, *Necessity*

Guerra requested a bond hearing, which the immigration judge denied on multiple occasions.[12] Guerra subsequently filed a habeas petition in the United States District Court for the Southern District of New York, seeking that the court order the immigration judge in his case to hold a bond hearing.[13] The District Court granted Guerra's habeas petition, and the United States Court of Appeals for the Second Circuit affirmed on appeal.[14] Guerra was freed on bond on New Year's Eve, 2014, after 359 days in ICE detention.[15]

Raul Padilla-Ramirez fled to the United States from El Salvador in 1999 to escape a life of sexual assaults, threats, and physical attacks.[16] When Padilla-Ramirez entered the United States, he did so without authorization.[17] By 2006, Padilla-Ramirez had married and started a family in the United States, and his child was born a U.S. citizen.[18] Eventually, ICE became aware that Padilla-Ramirez was in the United States and initiated removal proceedings against him in September of 2006.[19] During his initial removal proceedings, Padilla-Ramirez applied for asylum, withholding of removal, and protection under the United Nations Convention Against Torture.[20] An immigration judge

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and Sufficiency of Evidence Corroborating Alien's Testimony to Establish Basis for Asylum or Withholding of Removal, 179 A.L.R. FED. 357 (2002).

[12] Petitioner-Appellee's Brief, *Guerra II*, *supra* note 4, at 7–8. Bond hearings are a method of determining whether an individual subject to immigration detention should be released on bond or further detained. *See generally* Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 HASTING L.J. 363 (2014) (arguing in favor of bond hearings every six months for detained immigrants, while noting that bond allows individuals subject to immigration detention to be freed from custody).

[13] *Guerra II*, 831 F.3d at 61. Habeas petitions, more formally known as petitions for writ of habeas corpus, serve numerous functions in the American legal system, providing for post-conviction challenges to arrest or trial procedures, or to grant a bond or bail hearing. *See Habeas Corpus*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "habeas corpus" and detailing its many types and functions).

[14] *Guerra II*, 831 F.3d at 61; *Guerra I*, 2014 WL 7330449, at *1.

[15] Petitioner-Appellee's Brief, *Guerra II*, *supra* note 4, at 10.

[16] Padilla-Ramirez v. Bible (*Padilla-Ramirez I*), 180 F. Supp. 3d 697, 698 (D. Id. 2016); *see* Opening Brief of Petitioner at 2, *Padilla-Ramirez II*, 882 F.3d 826 (No. 16-35385) (detailing Padilla-Ramirez's suffering at the hands of his extended family and a gang that "effectively rule[s]" El Salvador). In his brief to the Ninth Circuit, Padilla-Ramirez detailed a life that included abandonment, threats, attacks, and sexual assaults in his home country, all of which prompted his attempts to come to the United States. Opening Brief of Petitioner, *Padilla-Ramirez II*, *supra*, at 2.

[17] *Padilla-Ramirez I*, 180 F. Supp. 3d at 698.

[18] *See* Excerpts of Record, Volume I of II at 14, *Padilla-Ramirez II*, 882 F.3d 826 (No. 16-35385) (detailing Padilla-Ramirez's family in 2016, which included his fifteen-year-old child who is a United States citizen). Padilla-Ramirez's children are citizens by birthright citizenship as provided in the United States Constitution. U.S. CONST. amend. XIV, § 1 ("All persons born . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States.").

[19] *Padilla-Ramirez I*, 180 F. Supp. 3d at 698–99.

[20] *Id.* at 699. Individuals qualify for asylum if they can show past persecution, or a "well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion in the [individual]'s country of citizenship." Kemper, *supra* note 11 (citing 8 U.S.C. § 1158). Withholding of removal is a form of relief from removal that is available to those

denied Padilla-Ramirez's requests, but allowed him to voluntarily depart the United States instead of being removed.[21] Padilla-Ramirez did not depart the United States by the deadline in his voluntary departure order, so the order automatically converted to an order of removal.[22] ICE removed Padilla-Ramirez to El Salvador in February of 2010.[23]

Padilla-Ramirez reentered the United States and was discovered by ICE while he was being held in the Ada County Jail in Boise, Idaho on a state criminal charge.[24] After Padilla-Ramirez's state charge was dropped, ICE took custody of him and reinstated his order of removal.[25] While he was detained, Padilla-Ramirez sent a letter to ICE detailing his fear of returning to El Salvador.[26] Subsequently, Padilla-Ramirez had a reasonable fear interview, where an asylum officer determined that Padilla-Ramirez did have a reasonable fear of returning to El Salvador.[27] Padilla-Ramirez's case was then transferred to an immigration judge to determine whether he was eligible for withholding of removal.[28] Padilla-Ramirez requested a bond hearing in front of the immigration judge, who determined that she did not have jurisdiction to grant bond

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who can show that the threat that the individual would face is a threat to life or freedom "because of the [individual]'s race, religion, nationality, membership in a particular social group, or political opinion." *Id.* (citing 8 U.S.C. § 1231). The United Nations Convention Against Torture is an international treaty, which the United States has ratified, that forbids removal of an individual to a country where they will be more likely than not be subject to torture, requires withholding of removal. 8 C.F.R. § 208.16(c). If an immigration judge grants an individual withholding of removal, that withholding only prevents their removal to a specific country, and not from the United States generally. *Id.* § 208.16(f).

[21] *Padilla-Ramirez I*, 180 F. Supp. 3d at 699. Voluntary departure orders are orders that an immigration judge can enter instead of an order of removal. 8 U.S.C. § 1229c(b)(1). An individual subject to a voluntary departure order must leave the United States within 120 days, or the order converts to an order of removal. *See Padilla-Ramirez I*, 180 F. Supp. 3d at 699 (noting the process of converting voluntary departure orders to orders of removal).

[22] *Padilla-Ramirez I*, 180 F. Supp. 3d at 699.

[23] *Id.* When ICE acts to remove individuals from the United States, the agency must remove them to the specific countries listed in their removal orders. *See Deportation*, USA.GOV (Aug. 16, 2017), https://www.usa.gov/deportation [https://perma.cc/3YWY-7FUM]. The government removes most individuals through the use of government-run flights, although some are removed by ground transportation. *Id.*

[24] *Padilla-Ramirez I*, 180 F. Supp. 3d at 699. The record in Mr. Padilla-Ramirez's case never identified the charges he faced in Idaho. *See* Answering Brief of Respondent-Appellees at 3, *Padilla-Ramirez II*, 882 F.3d 826 (No. 16-35385) (noting that Padilla-Ramirez was detained on "a number of state criminal charges"); *see also Padilla-Ramirez II*, 882 F.3d at 829 (referring to the reason for Padilla-Ramirez's detention in Idaho as "a state criminal prosecution"); *Padilla-Ramirez I*, 180 F. Supp. 3d at 699 (noting that Padilla-Ramirez was transferred to ICE custody after the dismissal of "pending state criminal charges"); Opening Brief of Petitioner, *Padilla-Ramirez II*, *supra* note 16, at 3 (noting that Padilla-Ramirez was in "criminal custody" prior to the dismissal of his "criminal proceedings").

[25] *Padilla-Ramirez I*, 180 F. Supp. 3d at 699.

[26] Opening Brief of Petitioner, *Padilla-Ramirez II*, *supra* note 16, at 3.

[27] *Padilla-Ramirez II*, 882 F.3d at 829.

[28] *Id.*

because Padilla-Ramirez was detained pursuant to 8 U.S.C. § 1231(a).[29] Padilla-Ramirez then filed a habeas petition, which the United States District Court for the District of Idaho denied, and the United States Court of Appeals for the Ninth Circuit subsequently affirmed that denial.[30] Padilla-Ramirez was eventually granted a bond hearing under then-standing Ninth Circuit precedent, which required bond hearings for noncitizens that had been detained for six months under either § 1226 or § 1231.[31]

Current federal law provides for the detention of unauthorized immigrants through two different statutory schemes.[32] One of those statutory schemes, § 1226, regulates detention before an order of removal becomes final, and requires bond hearings for most individuals detained thereunder.[33] The other statutory scheme, § 1231, addresses detention after an order of removal has become final, and does not provide for bond hearings.[34] In that context, the *Padilla-Ramirez* and *Guerra* cases raise the question: are reinstated orders of removal final and therefore unreviewable?[35]

Part I of this Note discusses the history of immigration law and practices in the United States, details the current provisions of federal law governing immigrant removals, and provides a general overview of statutory interpretation.[36] Part II examines the two recent federal appellate decisions that created the circuit split on the issue of reviewability of reinstated orders of removal and the far-reaching implications of those decisions.[37] Part III argues that Congress should resolve the current split by explicitly providing for the reviewability of reinstated orders of removal, and that proper analysis of the current

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[29] *Id.*

[30] *Id.* at 828 (affirming denial of the habeas petition in *Padilla-Ramirez I*); *Padilla-Ramirez I*, 180 F. Supp. 3d at 698 (denying Padilla-Ramirez's habeas petition seeking a bond hearing).

[31] *See* Petition for Writ of Certiorari at 11–12, Padilla-Ramirez v. Culley, No. 17-1568 (U.S. May 16, 2018). Under Ninth Circuit precedent at that time, noncitizens detained for more than six months were entitled to a bond hearing, regardless of what statute the government detained them under. *Id.* (citing Rodriguez v. Robbins, 804 F.3d 1060 (9th Cir. 2015)). In the time since the government granted Padilla-Ramirez's bond, the Supreme Court has overturned the Ninth Circuit decision that authorized bond in his case. *Id.* (citing Jennings v. Rodriguez, 138 S. Ct. 830, 847–48 (2018)).

[32] *Compare* 8 U.S.C. § 1226(a) (providing for detention of an individual "pending a decision on whether [that individual] is to be removed from the United States"), *with id.* § 1231(a) (providing for detention of an individual "during the removal period").

[33] *See* 8 C.F.R. § 1236.1(d)(1) (providing that an individual who is not subject to a final order of removal may apply to a have a bond hearing before an immigration judge to determine whether that person should be released on bond, and at what amount bond should be set).

[34] *See* 8 U.S.C. § 1231(a)(2) (providing that the Attorney General "shall detain" individuals removable under that section).

[35] *See* Opening Brief of Petitioner, *Padilla-Ramirez II*, *supra* note 16, at 2 (recognizing the first issue for review as whether a reinstated order of removal was administratively final); Petitioner-Appellee's Brief, *Guerra II*, *supra* note 4, at 14 (noting that the issue before the court was whether Guerra's reinstated order of removal was administratively final).

[36] *See infra* notes 39–137 and accompanying text.

[37] *See infra* notes 138–184 and accompanying text.

statutory system leads to the conclusion that reinstated orders of removal are reviewable.[38]

I. THE IMMIGRATION FRAMEWORK AND THE APPLICATION OF REMOVAL PROCEEDINGS IN THE UNITED STATES

The United States has been shaped by immigration since its founding.[39] The overwhelming majority of Americans are decedents of individuals who came to this country seeking the opportunity for a better life, away from the wars, oppression, or famine in their former countries.[40] As the United States has grown, so too has its need to establish and enforce immigration laws to protect the country and its people both physically and economically.[41] It is against that backdrop of tension between America's foundation upon immigrants, and its need to have and enforce immigration laws, that the current legal framework came into being.[42] In turn, it is that very framework that has led to the current split on the finality of reinstated orders of removal, which leaves the rights of over one hundred and fifty thousand individuals per year hanging in the balance.[43]

This Part explains both the historic and current immigration system in the United States, the current process of removal procedures, and the tools of stat-

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[38] *See infra* notes 185–213 and accompanying text.

[39] *See generally U.S. Immigration Before 1965*, HISTORY.COM (2009), https://www.history.com/topics/u-s-immigration-before-1965 [https://perma.cc/3GZJ-G3VZ] (detailing immigration trends in the United States from the 1500s until 1965).

[40] *See* KAREN R. HUMES ET AL., U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010, at 4 (2010), https://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf [https://perma.cc/BSV7-SUNP] (noting that only 0.9% of the United States population in 2010 was either American Indian or Alaskan Native, and that less than 0.1% was Native Hawaiian); *see, e.g.*, HISTORY.COM, *supra* note 39 (noting that "many immigrants came to America seeking greater economic opportunity, while some, such as the Pilgrims in the early 1600s, arrived in search of religious freedom").

[41] *See generally* D'Vera Cohn, *How U.S. Immigration Laws and Rules Have Changed Through History*, PEW RESEARCH CTR. (Sept. 30, 2015), http://www.pewresearch.org/fact-tank/2015/09/30/how-u-s-immigration-laws-and-rules-have-changed-through-history [https://perma.cc/U2ZV-H3QP] (detailing United States immigration law from 1790 until the present).

[42] *See* SARA MCELMURRY ET AL., THE CHI. COUNCIL ON GLOB. AFFAIRS & THE BIPARTISAN POLICY CTR., BALANCING PRIORITIES: IMMIGRATION, NATIONAL SECURITY, AND PUBLIC SAFETY 4–5 (2016), https://www.thechicagocouncil.org/sites/default/files/oct16_immigrationandnationalsecurty_report.pdf [https://perma.cc/ZSS7-VRP7] (noting the need to balance interests in national security with economic, cultural, and educational interests when considering immigration law reforms).

[43] *See* Jennifer Lee Koh, *Removal in the Shadow of Immigration Court*, 90 S. CAL. L. REV. 181, 203 n.117 (2017) (noting that U.S. immigration authorities reinstated 159,634 orders of removal in 2013 alone). *Compare* Padilla-Ramirez v. Bible (*Padilla-Ramirez II*), 882 F.3d 826, 831–32 (9th Cir. 2017) (analyzing the current framework of immigrant detention and determining that reinstated orders of removal are administratively final), *with* Guerra v. Shanahan (*Guerra II*), 831 F.3d 59, 62 (2d Cir. 2016) (analyzing the same framework but coming to the opposite conclusion as the *Padilla-Ramirez II* court).

utory interpretation that courts use to determine what rules apply to individuals subject to reinstated orders of removal.[44] Section A sets out a brief history of immigration policy and practices in the United States.[45] Section B details the means and procedures by which the government removes an individual for the first time.[46] Section C explains the different procedures applicable to individuals who reenter the United States after being removed.[47] Section D provides a brief overview of methods of statutory interpretation relevant to courts' determinations of what law is applicable to individuals subject to reinstated orders of removal.[48]

A. A Brief Overview of the History of Immigration in the United States

Throughout America's history, immigration has played a central role in shaping the country's identity and political landscape, encompassing moments of the nation's unity and division.[49] In its earliest days, the United States employed extremely restrictive immigration and naturalization policies.[50] American immigration policy long favored individuals from certain regions of the world, while explicitly or implicitly barring others from immigrating.[51] Beginning with the Second World War, the United States began utilizing immigration policy to provide protection for refugees of foreign wars.[52] Since the late

[44] *See infra* notes 49–137 and accompanying text.

[45] *See infra* notes 49–58 and accompanying text.

[46] *See infra* notes 59–105 and accompanying text.

[47] *See infra* notes 106–131 and accompanying text.

[48] *See infra* notes 132–137 and accompanying text.

[49] *See, e.g.*, *United States and the Holocaust, 1942–1945*, U.S. HOLOCAUST MEMORIAL MUSEUM (2017), https://www.ushmm.org/wlc/en/article.php?ModuleId=10007094 [https://perma.cc/L742-YRX4] (detailing establishment of the War Refugee Board to facilitate the acceptance of a greater number of Jews fleeing the Holocaust); *Trump's Executive Order: Who Does the Travel Ban Affect?*, BBC (Feb. 10, 2017), http://www.bbc.com/news/world-us-canada-38781302 [https://perma.cc/ETD8-VUZJ] (detailing the policy of halting immigration from various countries where the Islamic State was active); Cohn, *supra* note 41 (providing a general overview of various immigration policies in the United States from the 1700s to the present).

[50] *See* Cohn, *supra* note 41 (detailing the Naturalization Act of 1790, which allowed only "free white persons" of "good moral character" to become United States citizens, and the Chinese Exclusion Act of 1882, which barred immigration from China and prevented Chinese residents of the United States from being naturalized). At other times in American history, Congress designed laws to limit immigration by individuals from Asian countries and bar immigration by "anarchists, beggars, and importers of prostitutes." *Id.* (detailing the Asiatic Barred Zone Act of 1917 and the Anarchist Exclusion Act of 1903).

[51] *See id.* (detailing laws that, at certain times in American history, completely barred Chinese immigration, allowed for a greater number of immigrants from countries with a high number of individuals already in the United States, and established immigration quotas based on the hemisphere from which individuals immigrated).

[52] *See id.* (noting that the Refugee Relief Act of 1953 provided visas to over 200,000 refugees and that the 1975 Indochina Migration and Refugee Assistance Act provided for the migration of South Vietnamese allies of the United States and that Congress later expanded the law to include refugees from Cambodia and Laos).

1990s, much of American immigration law has been passed in response to unauthorized immigration and the threat of terrorism.[53]

As of 2018, immigrants come to the United States in one of three ways: by obtaining a form of permanent authorization to be in the country, by obtaining temporary authorization to be in the country, or by entering the country without authorization.[54] Permanent permission to enter the United States can be obtained by naturalization or through receipt of lawful permanent resident status.[55] The various I-94 visa programs, which allow individuals to enter the United States for work, school, or to visit, are one way to receive temporary permission to enter the country.[56] Entering the United States without authorization has become one of the most hotly contested issues in contemporary American political discourse.[57] The increased focus on unauthorized immigration

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[53] *See id.* (noting changes in the law in 1996, 2002, and 2006 motivated by terrorism and unauthorized immigration).

[54] *See* Philip Martin, *Trends in Migration to the U.S.*, POPULATION REFERENCE BUREAU (2014), https://www.prb.org/us-migration-trends/ [https://perma.cc/PGR2-J77X] (identifying the options available for entry into the United States as "a front door for immigrants, a side door for temporary visitors, and a back door for the unauthorized").

[55] *See Lawful Permanent Residents*, U.S. DEP'T OF HOMELAND SEC. (2017), https://www.dhs.gov/immigration-statistics/lawful-permanent-residents [https://perma.cc/PDJ7-YGCP] (detailing the process for becoming, and rights of, a lawful permanent resident); *Citizenship Through Naturalization*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (2013), https://www.uscis.gov/us-citizenship/citizenship-through-naturalization [https://perma.cc/G6R9-BLUK] (detailing the naturalization process). A total of 1,183,505 individuals received lawful permanent resident status in the United States in fiscal year 2016, marking the highest number to receive that status since 1991. *Persons Obtaining Lawful Permanent Resident Status: Fiscal Years 1820 to 2016*, U.S. DEP'T OF HOMELAND SEC. (2016), https://www.dhs.gov/immigration-statistics/yearbook/2016/table1 [https://perma.cc/4SUQ-5GSY]. In fiscal year 2016, of the 972,151 naturalization applications filed, 753,060 individuals became naturalized U.S. citizens. *Petitions for Naturalization Filed, Persons Naturalized, and Petitions for Naturalization Denied: Fiscal Years 1907 to 2016*, U.S. DEP'T OF HOMELAND SEC. (2016), https://www.dhs.gov/immigration-statistics/yearbook/2016/table20 [https://perma.cc/5UBA-AUX4].

[56] *See Immigrate*, U.S. DEP'T OF STATE, https://travel.state.gov/content/travel/en/us-visas/immigrate.html [https://perma.cc/K3X5-ETJS] (detailing long-term visas available); *Visitor Visa*, U.S. DEP'T OF STATE, https://travel.state.gov/content/travel/en/us-visas/tourism-visit/visitor.html#overview [https://perma.cc/RJQ8-RXDG] (detailing short-term visas available to visitors to the United States). I-94 Visas are issued to a broad range of individuals including temporary workers and their families, students, exchange visitors, diplomats and other representatives, temporary visitors for work or pleasure, individuals in continuous transit through the United States, commuter students, fiancées of U.S. citizens and their children, and spouses and children of U.S. citizens or lawful permanent residents. *See Nonimmigrant Admissions by Class of Admission: Fiscal Years 2013 to 2015*, U.S. DEP'T OF HOMELAND SEC. (2015), https://www.dhs.gov/immigration-statistics/yearbook/2015/table25 [https://perma.cc/G2HJ-PEQE]. In fiscal year 2015, the most recent year for which data is available through the Department of Homeland Security ("DHS"), there were 181,300,000 admissions into the country through some form Visa program, 76,638,236 of which were through I-94 Visas. *Id.* DHS does not track the unique entries into the country through these visa programs, so the number of individuals entering through visa programs is likely lower than the total number of admissions. *See id.*

[57] *Compare Immigration Reform*, THE OFFICE OF HILLARY RODHAM CLINTON (2017), https://www.hillaryclinton.com/issues/immigration-reform [https://perma.cc/9K9J-38HG] (reproducing the campaign website of then-presidential candidate Hillary Clinton, which detailed her proposals to enact

could be the result of a plethora of causes, including increasing numbers of such immigrants over the last thirty years, concerns regarding terrorism, and recent economic downturns both domestically and abroad.[58]

B. "First Instance" Removal Proceedings

The Executive Branch, through the Department of Homeland Security (DHS) and the Department of Justice (DOJ), is responsible for the enforcement of immigration laws enacted by Congress.[59] The DHS, through divisions such as Customs and Border Protection (CBP) and ICE, acts as the "front-line" enforcer of immigration laws.[60] Individuals found at or near the border by CBP are most often removed from the country through a process known as expedited removal.[61] Individuals who make it beyond the immediate border region or

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immigration reform to create an easier path to citizenship, maintain immigration policies enacted by the Obama Administration, end detention of families, close some detention centers, and invest $15 million in immigrant-integration programs), *with* DONALD J. TRUMP FOR PRESIDENT, INC., IMMIGRATION REFORM THAT WILL MAKE AMERICA GREAT AGAIN 2–4 (2016) https://assets.donaldjtrump.com/Immigration-Reform-Trump.pdf [https://perma.cc/G4HZ-Y976] (detailing then-presidential candidate Donald Trump's proposals to build a wall that Mexico would pay for, end birthright citizenship, triple the number of ICE Officers, defund sanctuary cities, and detain "illegal aliens" until they could be removed). As of February 6, 2018, the President of the United States was threatening the second government shutdown of 2018 over what he viewed as uncorrected issues with U.S. immigration policy. *See* Thomas Kaplan, *Congress, Tuning Out Trump's Threats, Focuses on Compromise*, N.Y. TIMES, Feb. 7, 2018, at A19 (detailing comments by the President that he would "love to see a shutdown if we don't get this [immigration] stuff taken care of").

[58] *See* Jeffery S. Passel & D'Vera Cohn, *As Mexican Share Declined, U.S. Unauthorized Immigrant Population Fell in 2015 Below Recession Level*, PEW RESEARCH CTR. (Apr. 25, 2017), http://www.pewresearch.org/fact-tank/2017/04/25/as-mexican-share-declined-u-s-unauthorized-immigrant-population-fell-in-2015-below-recession-level [https://perma.cc/4QUS-N78N] (detailing a rise in the total number of unauthorized immigrants from 3.5 million in 1990 to a peak of 12.2 million in 2007); *see, e.g.*, Cohn, *supra* note 41 (noting changes to U.S. immigration laws from 1996 to 2006 motivated by "concerns about terrorism"). Although unauthorized immigration did spike from 1990 to 2007, more recent trends show that the number of unauthorized entries per year is on the decline. *See* Passel & Cohn, *supra* (indicating that eleven million unauthorized entries into the United States occurred in 2015).

[59] *See* Koh, *supra* note 43, at 187–88 (detailing the control of the immigration process by departments of the Executive Branch).

[60] *See id.* at 188 (describing Customs and Border Protection (CBP) and ICE as DHS "subagencies" that employ "front-line immigration enforcement officers"); *Who We Are*, U.S. IMMIGRATION & CUSTOMS ENF'T (Aug. 24, 2018), https://www.ice.gov/about [https://perma.cc/BS3U-Z2R5] (detailing ICE's mission of identifying, apprehending, detaining, and removing individuals, and investigating "the illegal movement of people and goods"); *About CBP*, U.S. CUSTOMS & BORDER PROT. (Nov. 21, 2016), https://www.cbp.gov/about [https://perma.cc/FJ87-LKXC] (detailing CBP's mission of "keeping terrorists and their weapons out of the United States while facilitating lawful international travel and trade").

[61] *See* Koh, *supra* note 43, at 194–95 (detailing the practice of expedited removal). Expedited removal is a process by which the government can remove individuals seeking entry at the border, or who have entered the country but are found near the border, who lack proper entry documents, or present false documents. *Id.* at 195, 197. Expedited removal does not provide for any hearing or review, and can be accomplished by an immigration officer. *Id.* at 195–96. Immigration officials can

who overstay their temporary permission to be in the country face enforcement actions by ICE.[62] ICE carries out its enforcement actions by seeking out individuals that they determine are in the country illegally or by issuing detainer requests to local law enforcement.[63]

Once an individual is apprehended by ICE, the person's case is transferred to the DOJ's Executive Office for Immigration Review.[64] Individual cases are then assigned to an immigration judge within the Executive Office for Immigration Review.[65] Removal proceedings before an immigration judge may take place in the form of in-person proceedings, or may be conducted via video or telephone conference.[66] While a person's removal proceedings are ongoing in the Executive Office for Immigration Review, the Attorney General may detain that person pursuant to 8 U.S.C. § 1226.[67] Pursuant to § 1226, the Attorney General has the power of discretionary detention of certain classes of individuals, whereas others are subject to mandatory detention, pending a determination of their removability.[68] Section 1226(a) provides for the discre-

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utilize expedited removal to remove individuals who are at the border or who are found within one hundred miles of an international border after having entered within the last fourteen days. *Id.* at 197.

[62] *See What We Do*, U.S. IMMIGRATION & CUSTOMS ENF'T (Jan. 3, 2018), https://www.ice.gov/overview [https://perma.cc/X6ER-PBA9] (noting that "the majority of immigration enforcement work for ICE takes place in the country's interior").

[63] *See* Joseph O'Sullivan, *Chief Justice Asks ICE Not to Track Immigrants at State Courthouses*, SEATTLE TIMES (Apr. 5, 2017), https://www.seattletimes.com/seattle-news/politics/chief-justice-asks-ice-not-to-track-immigrants-at-state-courthouses [https://perma.cc/6TAQ-C4JN] (detailing actions that ICE takes to detain individuals if detainer requests are not honored by local law enforcement agencies); *see also Detainer*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "immigration detainer" as "a notice by the DHS to a federal, state, or local law-enforcement agency to . . . request that the agency retain custody of that person for additional time to allow the DHS time and opportunity to assume custody and determine whether the person is subject to removal from the United States").

[64] *See* 8 U.S.C. § 1229a (2012) (dictating the role of immigration judges in proceedings); *infra* note 65 (noting that immigration judges serve in the Executive Office for Immigration Review).

[65] *See* 8 U.S.C. § 1229a (providing that immigration judges preside over all removal proceedings). Through the Office of the Chief Immigration Judge, the Executive Office for Immigration Review employs nearly 330 immigration judges, sitting in fifty-eight locations in the United States. *Office of the Chief Immigration Judge*, U.S. DEP'T OF JUSTICE (July 17, 2018), https://www.justice.gov/eoir/office-of-the-chief-immigration-judge [https://perma.cc/E42U-5UF4]. Immigration judges are not Article III judges, but rather members of the Executive Branch who perform functions similar to those of an administrative law judge. Shobia Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1, 5 (2014) (detailing the position of immigration judges). Immigration judges are responsible for presiding over removal, deportation, and exclusion proceedings, and reviewing credible fear determinations made by asylum officers. *See id.* (explaining the responsibilities of immigration judges and noting that in 2013, immigration judges handled 193,350 cases).

[66] 8 U.S.C. § 1229a(b)(2).

[67] *Id.* § 1226; *see* Guerra v. Shannan (*Guerra I*), No. 14-CV-4203, 2014 WL 7330449, at *2 (S.D.N.Y. Dec. 23, 2014) (detailing the detention of individuals "while removal proceedings take place" under § 1226).

[68] *See* 8 U.S.C. § 1226(a), (c) (detailing when the Attorney General may arrest or detain an individual and when the Attorney General must arrest and detain certain individuals); *see also Guerra I*,

tionary detention of individuals in removal proceedings.[69] Most individuals detained pursuant to § 1226(a) are entitled to a bond hearing before an immigration judge to determine whether they should remain detained.[70] Certain classes of individuals—those enumerated in § 1226(c)—are not entitled to a bond hearing, and the Attorney General must detain those individuals during their removal proceedings.[71]

During removal proceedings, individuals are afforded procedural protections in addition to the right to a bond hearing.[72] These protections include the right to an attorney, the right to examine and present witnesses and evidence, and the right to contest the government's claims.[73] During removal proceedings, individuals that the government is attempting to remove may avoid entry of an order of removal in one of two ways.[74] First, if they have applied for admission into the country, they may show that they are "clearly and beyond doubt entitled to be admitted" and that they are not inadmissible on other grounds.[75] Second, individuals can show by clear and convincing evidence that they were lawfully present in the country at the time of their apprehension.[76] The government, on the other hand, has the burden to show by clear and convincing evidence that the individual is removable under a provision of federal

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2014 WL 7330449, at *1 n.1, *2 (describing detention under § 1226(a) as "discretionary detention" and detention under § 1126(c) as "mandatory detention").

[69] *See Guerra I*, 2014 WL 7330449, at *2 (describing § 1226(a) as "the 'discretionary detention' provision").

[70] *See, e.g.*, *Padilla-Ramirez II*, 882 F.3d at 829 (recognizing that individuals detained under § 1226 "may request an additional bond hearing before an [immigration judge]"); *Guerra II*, 831 F.3d at 62 (recognizing that individuals detained under § 1226 "may request a bond hearing before an [immigration judge]"); Straker v. Jones, 986 F. Supp. 2d 345, 363 (S.D.N.Y. 2013) (explaining that individuals detained under § 1226(a) are "entitled to a bond hearing").

[71] *See* 8 U.S.C. § 1226(c)(1) (mandating the detention of individuals who are inadmissible or deportable based on various sections of 8 U.S.C. §§ 1182, 1227). Section 1226(c) does not permit bond hearings, and individuals subject to detention under the section are only eligible for release in limited circumstances. *See id.* § 1226(c)(2) (allowing for the release of individuals covered under § 1226(c)(1) if it is necessary to protect certain people and if the Attorney General determines that the individual is not dangerous to others or property and will likely appear at their hearing).

[72] *See* Wadhia, *supra* note 65, at 5–6 (citing 8 U.S.C. § 1229(b) (2012)) (detailing protections afforded to individuals in ongoing removal proceedings).

[73] *See* 8 U.S.C. § 1229a(b)(4) (2012) (providing individuals in removal proceedings with rights related to the conduct of proceedings). Section 1229a's right to an attorney only applies if it is not at the expense of the government. *Id.* This means that individuals must either pay for their own attorney or rely on pro bono legal aid. *See id.* (providing a right to counsel "at no expense to the Government"); Wadhia, *supra* note 65, at 6 (noting that the counsel is only guaranteed at "no expense to the government"). Although § 1229a does provide certain rights to individuals facing removal, those guarantees have been criticized as lacking the same force as the rights afforded to criminal defendants. *See* Wadhia, *supra* note 65, at 6 n.31 (collecting sources detailing the shortcomings of procedural safeguards in the removal process based on the view of such proceedings as civil matters).

[74] 8 U.S.C. § 1229a(c)(2).

[75] *Id.* § 1229a(c)(2)(A).

[76] *Id.* § 1229a(c)(2)(B).

law.[77] Individuals may voluntarily depart the country at any time prior to the completion of their removal proceedings, so long as they are not deportable because they are a terrorist or have committed an aggravated felony.[78]

Removal proceedings can conclude with the issuance of an order of removal by the immigration judge, the voluntary departure by the individual facing removal, or a finding that the individual is not removable.[79] At the end of a removal proceeding, the immigration judge may, in certain circumstances, issue a voluntary departure order.[80] When individuals are to voluntarily depart, either prior to the conclusion of removal proceedings or in response to an order by an immigration judge, they are given a certain amount of time in which to leave the country and they may be required to post a bond.[81] Alternatively, if individuals are found to not be removable—either because they were admitted as a result of their removal proceedings or because they were accidently placed

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[77] *Id.* § 1229a(c)(3).

[78] *See id.* § 1229c(a)(1) (providing that immigration judges cannot allow individuals deportable under 8 U.S.C. § 1227(a)(2)(A)(iii), (a)(4)(B) to voluntarily depart the country). The statutes regarding immigrant detention and removal do not explicitly define "aggravated felony," simply stating that individuals "convicted of an aggravated felony at any time after admission [are] deportable." *Id.* § 1227(a)(2)(A)(iii); *see id.* § 1101 (providing no definition for "aggravated felony"). The statutes do specifically enumerate terrorism-related grounds for deportability, specifically by treating conduct that would disqualify someone from admission to the United States as grounds for deportability. *See id.* § 1227(a)(4)(B) (treating some inadmissibility grounds listed in 8 U.S.C. § 1182(a)(3) as deportability grounds). The terrorism-related grounds for inadmissibility are broad and allow the Attorney General to exercise significant discretion in determining what individuals qualify as terrorists. *See, e.g.*, *id.* § 1182(a)(3)(B)(i)(II) (providing that a person may be inadmissible if "the Attorney General . . . knows, or has reasonable ground to believe, [the individual] is engaged in or is likely to engage after entry in any terrorist activity").

[79] *See* Koh, *supra* note 43, at 189–91 (detailing the possible resolutions of removal proceedings).

[80] *See* 8 U.S.C. § 1229c(b)(1) (allowing for immigration judges to enter "an order granting voluntary departure in lieu of removal").

[81] *Compare id.* § 1229c(a)(2)(A), (a)(3) (stating that the Attorney General "may" require a bond from individuals who wish to voluntarily depart before the end of removal proceedings, and that such individuals must depart the country within 120 days), *with id.* § 1229c(b)(2), (b)(3) (requiring a bond from individuals subject to a voluntary order of removal issued by an immigration judge, and requiring those individuals to depart the country within sixty days or be subject to an order of removal). When an immigration judge allows an individual to voluntarily depart, the immigrant has a 120-day window in which to depart, at which point the voluntary departure order becomes an order of removal. *See Padilla-Ramirez I*, 180 F. Supp. 3d at 699 (detailing the conversion of a voluntary departure order into an order of removal). Before leaving the United States under a voluntary departure order, an individual and ICE complete part of a "Voluntary Departure and Verification of Departure Form." *Immigration Bond: How to Get Your Money Back*, CATHOLIC LEGAL IMMIGRATION NETWORK, INC. (2016), https://cliniclegal.org/resources/immigration-bond-how-get-your-money-back [https://perma.cc/ZQK7-MN5Z]. After departing the country, an individual must take the form to a U.S. consulate or embassy, where it is completed by a state department official, thereby allowing the individual to recover the posted bond. *See id.*

in removal proceedings even though they were legally present in the country—then they are allowed to remain in the United States.[82]

When an immigration judge enters an order of removal against an individual, that individual has the right to ask for reconsideration of the order of removal and the right to appeal that order to the Board of Immigration Appeals.[83] In some circumstances, individuals may also be allowed to seek relief for want of due process by filing in federal court.[84] The first step for an individual seeking review of an order of removal is an appeal to the Board of Immigration Appeals, which serves as the appeals division of the Executive Office for Immigration Review, reviewing appeals from the determinations of immigration judges.[85] The Board of Immigration Appeals has jurisdiction to review any matter decided by the immigration judge in the former proceedings, and has the power to affirm, reverse, or remand those decisions.[86] When an individual wishes to have the immigration judge's decision reconsidered after review by the Board of Immigration Appeals, the individual must file a motion to reconsider within thirty days of the administrative finality of that decision.[87] The motion must specify any errors that the individual believes occurred in the initial removal proceeding.[88] Even if all those levels of review find that the individual is removable, relief from an order of removal can be pursued by making a claim for asylum, for withholding of removal under federal law, or for protection under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[89]

Applications for asylum and applications for withholding of removal are related, yet distinct, types of relief that an individual facing removal can seek.[90] Asylum claims are governed by 8 U.S.C. § 1158, which requires an

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[82] *See* 8 U.S.C. § 1229a(c)(2) (noting that the only two arguments that individuals can make against removal are that they should be admitted to the country, or that they were in the country legally).

[83] *Id.* § 1229a(c)(4), (6).

[84] *See* Koh, *supra* note 43, at 191–92 (detailing the rise in the use of due process claims to seek relief in immigration proceedings and the existence of procedural rights in those proceedings). For an immigrant to seek review in federal court, the order of removal against the individual must be administratively final. *Id.*

[85] *See* Wadhia, *supra* note 65, at 5 (describing the Board of Immigration Appeals as the "administrative appellate division" of the Executive Office for Immigration Review).

[86] *See* 8 C.F.R. § 1003.1 (2018) (outlining the powers and jurisdiction of the Board of Immigration Appeals).

[87] 8 U.S.C. § 1229a(c)(6).

[88] *Id.*

[89] *See* Veena Reddy, *Judicial Review of Final Orders of Removal in the Wake of the Real ID Act*, 69 OHIO ST. L.J. 557, 563 (2008) (detailing options available to individuals facing an order of removal). For purposes of this Note, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is referred to as the "Convention Against Torture," as it is throughout federal statutes and regulations. *See, e.g.*, 8 C.F.R. § 208.16.

[90] *See* Kemper, *supra* note 11 (noting the differences between claims for asylum and applications for the withholding of removal).

individual to show persecution in the past or a "well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion in the [individual]'s country of citizenship."[91] Withholding of removal requires a higher bar of proof, that of a "clear probability of persecution."[92] Withholding of removal also requires a showing that the threat an individual would face is a threat to life or freedom "because of the [individual]'s race, religion, nationality, membership in a particular social group, or political opinion."[93] In addition to their procedural differences, asylum and withholding of removal grant different remedies to individuals facing removal.[94]

Individuals can also obtain relief from removal by seeking withholding of removal under the Convention Against Torture.[95] The Convention Against Torture is an international treaty, requiring signatory countries to, *inter alia*, prevent torture from occurring in their own jurisdictions, refuse to remove or extradite individuals to a country where they would be tortured, and criminalize and prosecute torture occurring domestically.[96] Pursuant to the treaty, individuals in the United States who can show that it is more likely than not that they will be tortured if they are returned to their country of origin can obtain withholding of removal.[97] Nevertheless, individuals who are granted withholding of removal under the Convention Against Torture can still be removed to any other country besides the country where they would be tortured.[98] If an immigration judge denies withholding of removal an individual can appeal that determination to the Board of Immigration Appeals.[99]

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[91] *Id.* (citing 8 U.S.C. § 1158); *see* Michael McGarry, *A Statute in Particularly Serious Need of Reinterpretation: The Particularly Serious Crime Exception to Withholding of Removal*, 51 B.C. L. REV. 209, 214 (2010) (outlining burden and elements of an asylum claim).

[92] INS v. Stevic, 467 U.S. 407, 413 (1984); McGarry, *supra* note 91, at 214.

[93] 8 U.S.C. § 1231(b)(3)(A); Kemper, *supra* note 11.

[94] *See* McGarry, *supra* note 91, at 214 & n.39 (collecting authorities explaining that relief under withholding of removal only prevents removal to that specific country, whereas relief under asylum could result in the grant of lawful permanent resident status).

[95] *See* 8 C.F.R. § 208.16(c) (detailing the process and burden to apply for withholding of removal under the Convention Against Torture).

[96] *See* Kristen B. Rosati, *The United Nations Convention Against Torture: A Self-Executing Treaty that Prevents the Removal of Persons Ineligible for Asylum and Withholding of Removal*, 26 DENV. J. INT'L L. & POL'Y 533, 534, app. I (1998) (detailing the limits placed on the United States as a signatory country of the Convention Against Torture). The Rosati article provides the full text of the Convention Against Torture. *Id.*

[97] 8 C.F.R. § 208.16(c).

[98] *See* 8 U.S.C. § 1231(b)(2)(E) (providing for the removal of individuals to countries other than those designated in their removal orders); 8 C.F.R. § 208.16(f) (noting that, in both withholding under § 1231 and withholding under the Convention Against Torture, the government is not prevented from "removing an [individual] to a third country other than the country to which removal has been withheld").

[99] 8 C.F.R. § 1003.1(b).

Once an immigration judge issues an order of removal against an individual, the order of removal becomes "administratively final" when either the Board of Immigration Appeals affirms the order or the appeals period expires and the person's options for avoiding removal are exhausted.[100] At that point in the process, the individual is held by ICE, which remains responsible for the person's detention and eventual removal.[101] That detention is governed by 8 U.S.C. § 1231.[102] Like § 1226, which governs detention pending a determination of removability, § 1231 also provides for both mandatory and discretionary detention once an individual is subject to a final order of removal.[103] Section 1231(a)(2) provides for the mandatory detention of individuals subject to a final order of removal during the "removal period," which is a ninety-day period following the administrative finality of an order of removal.[104] Individuals who are not removed within the ninety-day "removal period" may remain detained subject to discretionary detention, which is governed by § 1231(a)(6).[105]

C. Reinstated Orders of Removal

Following the removal of an individual from the United States through the process detailed above, many of those individuals seek reentry into the country through both legal and illegal means.[106] To reenter the country legally, individuals that were previously removed from the country can either wait the time prescribed by their removal order and apply for lawful permanent resident status or a visa, or submit an I-212 Form to request a waiver of the inadmissi-

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[100] *See Guerra I*, 2014 WL 7330449, at *2 (citing 8 U.S.C. § 1101(a)(47)(B)) (describing the prerequisites for administrative finality).

[101] *See* Wadhia, *supra* note 65, at 5 (detailing the execution of orders of removal by ICE).

[102] 8 U.S.C. § 1231(a)(1)(B)(i)–(iii); *see Padilla-Ramirez II*, 882 F.3d at 830 (explaining that the provisions of 8 U.S.C. § 1231 apply to an individual beginning on the date of administrative finality of an order of removal, the date of a judicial stay of removal, or on the date the government releases an individual from non-immigration detention, whichever is latest).

[103] *Compare Padilla-Ramirez II*, 882 F.3d at 829–30 (describing discretionary and mandatory detention provisions of § 1231), *with supra* notes 68–70 and accompanying text (detailing discretionary and mandatory detention under § 1226).

[104] 8 U.S.C. § 1231(a)(1)(C); *Guerra I*, 2017 WL 7330449, at *2 n.3; *see Padilla-Ramirez II*, 882 F.3d at 829 (describing § 1231(a)(2)'s provision for mandatory detention).

[105] *Padilla-Ramirez II*, 882 F.3d at 829–30. Section 1231(a)(6) affords individuals detained under that section more protections than those detained under § 1231(a)(2), given the length of their detention. *See id.* at 830 (citing Diouf v. Napolitano, 634 F.3d 1081, 1084 (9th Cir. 2011)) (recognizing that "individuals detained under § 1231(a)(6) are entitled to the same procedural safeguards against prolonged detention as individuals detained under § 1226(a)"); *Guerra I*, 2017 WL 733049, at *2 n.3 (recognizing that individuals detained beyond the removal period are entitled to "periodic custody reviews").

[106] *See, e.g.*, MARK GRIMES ET AL., UNIV. OF ARIZ. NAT'L CTR. FOR BORDER SEC. & IMMIGRATION, REASONS AND RESOLVE TO CROSS THE LINE: A POST-APPREHENSION SURVEY OF UNAUTHORIZED IMMIGRANTS ALONG THE U.S.-MEXICO BORDER 10 (2013), http://www.borders.arizona.edu/cms/sites/default/files/Post-Apprehension-Survey-REPORT%20may31-2013.pdf [https://perma.cc/8FW5-VFHP] (noting the numbers of individuals that attempt reentry after removal).

bility period and be allowed to apply for the aforementioned status or visa sooner.[107] Due in part to the length and complexity of the legal reentry process, many individuals that were previously removed seek reentry through unauthorized means.[108] When a previously removed individual is found to have illegally reentered the United States, the government has the option to prosecute that individual for the crime of illegal reentry.[109] Alternatively, the government can reinstate the reentered individual's previous order of removal pursuant to § 1231, accelerating the removal process.[110] Although illegal reentry prosecutions occur in federal districts near the border, the more common result faced by previously removed individuals that reenter the country without authorization is that their former order of removal is reinstated and they are removed again.[111] The use of reinstated orders of removal increased exponentially between fiscal years 2005 and 2013, with the frequency with which they were employed increasing nearly 270%.[112]

When first authorized during the height of McCarthyism in the 1950s, the practice of reinstating orders of removal was designed to streamline the process of removing previously removed communists, saboteurs, and anarchists.[113] Despite the initial narrow scope of reinstated removal orders, just two

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[107] *See* 8 U.S.C. § 1326(a)(2) (detailing conditions under which an individual can reenter the country after removal).

[108] *See* Koh, *supra* note 43, at 203 (citing GRIMES ET AL., *supra* note 106, at 9) (noting that "a 2011–2012 survey of those apprehended at the border found that individuals with longstanding ties to the United States were twice as likely to plan an attempt to reenter the country, and that people with families in the United States were two to three times more likely to do so"); Ilona Bray, *After Removal: Possibilities for Reentry to the U.S.*, NOLO, https://www.nolo.com/legal-encyclopedia/after-removal-possibilities-reentry-the-us.html [https://perma.cc/N42Y-JVUB] (noting that, after deportation, an individual can be barred from reentering the United States for a period of five to twenty years, or indefinitely).

[109] *See* 8 U.S.C. § 1326 (2012) (defining the crime of illegal reentry, and prescribing punishments including a fine, or up to twenty years imprisonment, or both).

[110] *See id.* § 1231(a)(5) (prescribing the procedure for reinstating an order of removal against a previously removed individual).

[111] *See* Koh, *supra* note 43, at 203 n.117 (noting that in the fiscal year 2013, the government reinstated 159,634 orders of removal, compared to 18,498 prosecutions for illegal reentry).

[112] *Id.* at 204 (citing AM. IMMIGRATION COUNCIL, REMOVAL WITHOUT RECOURSE: THE GROWTH OF SUMMARY DEPORTATIONS FROM THE UNITED STATES 2 (2014), https://www.americanimmigrationcouncil.org/sites/default/files/research/removal_without_recourse.pdf [https://perma.cc/X4AK-9Y9B]) (noting the increase in the use of reinstated removal orders between 2005 and 2013).

[113] *See* Internal Security Act of 1950, ch. 1024, 64 Stat. 987, 1012 (1950) (codified at 8 U.S.C. § 156) (repealed 1952) (allowing for the reinstatement of orders of removal against "criminals, prostitutes, procurers or other immoral persons, anarchists, subversives and similar classes," who unlawfully reentered the United States after removal). Congress passed the Internal Security Act of 1950 over the veto of President Truman, during the height of McCarthyism. *See* 96 CONG. REC. 15,722–23 (1950) (statement of Sen. McCarran) (detailing opposition to the President's veto); *see, e.g.*, *id.* at 14,853 (statement of Sen. Rankin) (supporting initial passage of the Internal Security Act; stating "if it takes a concentration camp for these traitors, then I am for sending them to concentration camps; if it takes deportation, then I am in favor of sending out a boatload a week from now on. We are not going

years after their inception as a practice, Congress expanded the applicability of reinstated orders of removal to other classes of unauthorized immigrants.[114] The scope of reinstated orders of removal remained relatively unchanged until Congress expanded the scope again as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.[115] In addition to Congress's changes to the applicable scope of reinstated orders of removal, the Immigration and Naturalization Service (INS) also made changes to the regulations governing the procedure for reinstating such orders.[116] One of the most significant of those procedural changes allowed ICE officers to reinstate an order of removal without an immigration judge's oversight or review.[117]

As the law stands in 2018, when the government seeks to reinstate an order of removal against a previously removed individual, the officer seeking to reinstate the order need only show three elements.[118] First, the officer must show that there was a previous removal order.[119] The officer also must show

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to permit this gang of Reds to destroy the American Government or the American way of life, or wreck our Christian civilization").

[114] *See* Lee J. Teran, *Mexican Children of U.S. Citizens: "Viges Prin" and Other Tales of Challenges to Asserting Acquired U.S. Citizenship*, 14 SCHOLAR 538, 658 (2012) (detailing provisions of the Immigration and Nationality Act of 1952 ("INA") that allowed the reinstatement of orders of removal against individuals who the government had previously removed because of crimes, false documents, or security concerns). Even with those broadening changes, reinstatement of removal under the INA still required an individual to appear before an immigration judge, who alone had the power to reinstate an order of removal. *See id.* at 658 & n.413 (citing Morales-Izquierdo v. Gonzales, 486 F.3d 484, 499 (9th Cir. 2007); 8 C.F.R. § 242.23 (1991)) (noting that previous INS "regulations provided for the issuance of an order to show cause, hearing before an immigration judge, and an order issued by the judge").

[115] *See* Teran, *supra* note 114, at 659–60 (citing the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, § 305(a)(3), 110 Stat. 3009) (detailing changes to the process for reinstating orders removal made by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996). Specifically, Congress expanded the applicability of reinstated orders of removal beyond their limited former scope to apply them to any individual who had previously been subject to an order of removal. *Compare* 8 U.S.C. § 1231(a)(5) (2000) (allowing for the reinstatement of an order of removal against any individual who "reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal"), *with* Immigration and Nationality Act of 1952, ch. 5, § 242, 66 Stat. 208 (repealed 1996) (allowing reinstatement of orders of removal against smugglers, criminals, individuals who failed to register with immigration authorities or falsified immigration documents, and individuals who posed a threat to national security).

[116] *See* Teran, *supra* note 114, at 659 (making note of changes to reinstated orders of removal that allowed "low level officers" to reinstate orders of removal). INS has since been eliminated, and its former role is now filled by ICE, CBP, and the U.S. Citizenship and Immigration Services. *See Did You Know?: The INS No Longer Exists*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., https://www.uscis.gov/archive/blog/2011/04/did-you-know-ins-no-longer-exists [https://perma.cc/7G98-9JT7] (noting the transfer of the INS's previous duties to those agencies).

[117] *See* Teran, *supra* note 114, at 659 (identifying regulatory changes that confirm that individuals subject to reinstated orders of removal do not have a right to a hearing before an immigration judge).

[118] 8 C.F.R. 241.8(a)(1)–(3); *see* Koh, *supra* note 43, at 204 (detailing the three elements required for reinstatement); Wadhia, *supra* note 65, at 7 (detailing the same three elements).

[119] 8 C.F.R. § 241.8(a)(1).

that the individual seeking to be removed was the subject of that removal order.[120] Finally, the officer must show that the individual was removed and subsequently reentered the United States.[121] Because the forms of relief from removal under a reinstated order of removal are limited, the entire removal process under a reinstated order—from detention to deportation—can take as little as a few hours.[122] Although 8 U.S.C. § 1231(a)(5) specifically states that a reinstated order of removal is "not subject to being reopened or reviewed," and that the person sought to be removed "is not eligible and may not apply for any relief under" the immigration laws, exceptions exist.[123]

The most general exception to § 1231(a) allows individuals subject to reinstated orders of removal to have access to a reasonable fear determination.[124] In order to be referred to an asylum officer for a reasonable fear determination, an individual must express a fear of being removed to the country specified in that individual's order of removal.[125] The asylum officer must then conduct an interview with the individual, which must take place within ten days of referral to the asylum officer.[126] The interview, as contemplated in its governing regulation, is non-adversarial, and the individual seeking withholding of removal is afforded the right to representation, and to present evidence and witnesses.[127] If, after the interview, the asylum officer determines that the individual did not state a reasonable fear, the individual has the right appeal that determination to an immigration judge for review.[128] If, on the other hand, an asylum officer finds that an individual subject to a reinstated order of removal did state a reasonable fear of returning to the country that the individual was ordered returned to, the asylum officer transfers the case to an immigration judge to determine whether the individual's removal should be withheld.[129] The proceedings before the immigration judge, known as "withholding-only proceedings," cannot be used to challenge the underlying removal order, but instead only ad-

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[120] *Id.* § 241.8(a)(2).

[121] *Id.* § 241.8(a)(3).

[122] Teran, *supra* note 114, at 661 (noting that, in the context of Mexican nationals arrested near the U.S. border with Mexico, reinstated removal can take "a matter of hours"); *see* Koh, *supra* note 43, at 204–05 (describing how there is "little room for further review" of reinstated orders of removal, and commenting that the avenues for protection from removal are "extremely narrow").

[123] 8 U.S.C. § 1231(a)(5); *see* 8 C.F.R. § 241.8(d)–(e) (recognizing exceptions for individuals who have applied for status adjustments under various laws, or who allege that they fear returning to the country they are ordered removed to).

[124] 8 C.F.R. § 241.8(e).

[125] *Id.* § 208.31(b).

[126] *Id.*

[127] *Id.* § 208.31(c).

[128] *Id.* § 208.31(g).

[129] *Id.* § 208.31(e). The statute governing reinstated removal proceedings specifically forbids the Attorney General from removing an individual to a country where that individual's "life or freedom would be threatened." 8 U.S.C. § 1231(b)(3)(A).

dresses the claim for withholding of removal.[130] If the immigration judge denies an individual's request for withholding of removal, that individual can appeal the determination to the Board of Immigration Appeals.[131]

D. Overview of the Means of Judicial Interpretation of Statutes

Because the finality of orders of removal is governed primarily by two differing statutory schemes, much of the divergence between the Second and Ninth Circuits arises from differing statutory interpretation.[132] Courts undertaking statutory interpretation begin with the language of the statute as written by Congress.[133] If no satisfactory determination as to the meaning of a statute can be reached by examining the language of the statute itself, courts then look to federal regulations interpreting and applying those statutes for guidance.[134] In certain situations, administrative interpretations of federal regulations are granted deference by courts, although only if the regulation directly addresses the statutory vagueness and is based on a permissive statutory construction.[135] If courts need to look beyond the text of the statute and the regulations interpreting the statute, they then examine the structure of the ambiguous statutory scheme to determine the meaning of the ambiguous statute.[136] Every U.S. Cir-

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[130] *See Guerra II*, 831 F.3d at 61–62 (identifying the proceedings before an immigration judge as withholding-only proceedings and noting their narrower scope).

[131] *See Guerra I*, 2017 WL 7330449, at *3 (citing 8 C.F.R. § 208.31(e)) (noting that an "immigration judge's withholding determination can be appealed to the Board of Immigration Appeals").

[132] *See Padilla-Ramirez II*, 882 F.3d at 830 (detailing the statutory interpretation employed by the Ninth Circuit); *Guerra II*, 831 F.3d at 62–63 (noting the contrary statutory interpretation used by the Second Circuit).

[133] *See* Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985) (noting, while interpreting the Lanham Act, that "statutory construction must begin with the language employed by Congress"); Am. Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982) (noting, while interpreting provisions of Title VII of the Civil Rights Act of 1964, that "[the Court's] starting point must be the language employed by Congress").

[134] *See Padilla-Ramirez II*, 882 F.3d at 831 (examining federal regulations after finding that the statutory text did not answer the reviewability question, but before the court "conduct[ed] [its] own [independent] review of the statute"); *Guerra II*, 832 F.3d at 63–64 (addressing the government's arguments regarding the use of federal regulations to answer the question of the reviewability of a reinstated order of removal).

[135] *See Guerra II*, 831 F.3d at 63–64 (citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984)) (noting that the limits of regulatory and administrative deference require the examining court to consider whether the administrative interpretation is on point, and whether the underlying regulation is "based on a permissible construction of the statute"). Under *Chevron*, courts must defer to agency interpretations of law, so long as those interpretations are reasonable. *See* Sanford Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-*Chevron *Era*, 32 B.C. L. REV. 757, 759 (1991) (detailing the crux of the Supreme Court's *Chevron* holding).

[136] *See Padilla-Ramirez II*, 882 F.3d at 832–33 (analyzing the overall statutory structure of removal proceedings, after discussing the text of the statute); *Guerra II*, 831 F.3d at 62–63 (addressing the structure of the statutes in question after having examined the language of the statute).

cuit Court has recognized that questions of statutory interpretation are reviewed de novo on appeal.[137]

II. Differing Standards of Finality Resulting in Differing Rights for Unauthorized Immigrants

Currently, the Second and Ninth Circuit Courts of Appeals are split as to the reviewability of reinstated orders of removal, and consequently as to whether individuals subject to such orders of removal have the right to a bond hearing.[138] That split provides some individuals who are subject to reinstated orders of removal the right to a bond hearing, while denying that right to others in the same situation.[139] The current split is only likely to grow as more courts address this question without Supreme Court precedent on the issue, or an explicit statutory clarification.[140]

This Part discusses the cases that created the circuit split over the reviewability of reinstated orders of removal.[141] Section A details the Second Circuit's decision in *Guerra II*, which recognized that an individual who is subject to a

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[137] *See* Parsons v. U.S. Dep't of Justice, 878 F.3d 162, 167 (6th Cir. 2017) (noting that statutory interpretation is subject to de novo review); Ingham Reg'l Med. Ctr. v. United States, 874 F.3d 1341, 1346 (Fed. Cir. 2017) (same); Sinclair Wyo. Ref. Co. v. U.S. Envtl. Prot. Agency, 887 F.3d 986, 990 (10th Cir. 2017) (same); Ela v. Destefano, 869 F.3d 1198, 1201 (11th Cir. 2017) (same); LNV Corp. v. Outsource Servs. Mgmt., L.L.C., 869 F.3d 662, 666 (8th Cir. 2017) (same); Winebow, Inc. v. Capitol-Husting Co., Inc., 867 F.3d 862, 867 (7th Cir. 2017) (same); Corsair Special Situations Fund, L.P. v. Pesiri, 863 F.3d 176, 179 (2d Cir. 2017) (same); Buntin v. City of Boston, 857 F.3d 69, 72 (1st Cir. 2017) (same); U.S. *ex rel.* Carson v. Manor Care, Inc., 851 F.3d 293, 302 (4th Cir. 2017) (same); Pineda v. JTCH Apartments, L.L.C., 843 F.3d 1062, 1064 (5th Cir. 2016) (same); Castro v. U.S. Dep't of Homeland Sec., 835 F.3d 422, 429 (3rd Cir. 2016) (same); Doe v. Internet Brands, Inc., 824 F.3d 846, 850 (9th Cir. 2016) (same); *see also Hearing*, Black's Law Dictionary (10th ed. 2014) (defining "hearing de novo" as a hearing that gives "no deference to a lower court's findings" or is "conducted as if the original hearing had not taken place").

[138] *See* Padilla-Ramirez v. Bible (*Padilla-Ramirez II*), 882 F.3d 826, 834–35 (9th Cir. 2017) (citing Guerra v. Bible (*Guerra II*), 831 F.3d 59, 62–64 (2d Cir. 2016)) (rejecting, expressly, the Second Circuit's conclusion in *Guerra II* and indicating that the Supreme Court should step in to "harmonize the resulting split").

[139] *Compare Padilla-Ramirez II*, 882 F.3d at 832 (reasoning that because individuals subject to reinstated orders or removal are detained pursuant to 8 U.S.C. § 1231(a), they are not entitled to a bond hearing), *with Guerra II*, 831 F.3d at 60–61 (reasoning that because individuals subject to reinstated orders or removal are detained pursuant to 8 U.S.C. § 1226(a), they are entitled to a bond hearing). This split causes divergent outcomes in identical cases because, as circuit-level decisions, they are only binding on the lower courts in that circuit. *See, e.g.*, *In re* Korean Air Lines Disaster of Sept. 1, 1983, 829 F.2d 1171, 1176 (D.D.C. 1987) (Ginsburg, J.) (explaining that "[b]inding precedent for all is set only by the Supreme Court, and for the district courts within a circuit, only by the court of appeals for that circuit").

[140] *See Padilla-Ramirez II*, 882 F.3d at 831 (noting that the "statutory definition of finality does not dictate a clear answer" to the question of which section applies to individuals subject to reinstated orders of removal); *Guerra II*, 831 F.3d at 62 (noting that the question of whether § 1226 or § 1231 applies to individuals subject to reinstated orders of removal was one of first impression).

[141] *See infra* notes 146–184 and accompanying text.

reinstated removal order but has ongoing withholding-of-removal proceedings is entitled to a bond hearing.[142] Section B examines the Ninth Circuit's decision in *Padilla-Ramirez II*, which declined to recognize a right to a bond hearing for individuals subject to reinstated orders of removal.[143] Section C makes note of decisions and the reasoning used by other district courts that have determined whether reinstated orders of removal are final.[144] Section D details the widespread impact of the currently murky status of entitlement to bond hearings.[145]

A. The Second Circuit's Affirmance of the Southern District of New York's Decision that Reinstated Orders of Removal are Reviewable

While Guerra's application for withholding of removal was pending before an immigration judge, that immigration judge refused to hold a hearing to consider releasing Guerra on bond, citing a lack of jurisdiction to do so.[146] Guerra then filed a habeas petition in the United States District Court for the Southern District of New York seeking immediate release from custody, or alternatively, a bond hearing.[147] Guerra contended that he was being detained pursuant to 8 U.S.C. § 1226(a), and was therefore entitled to a bond hearing.[148] The government argued that because the underlying order of removal could not be challenged, that order constituted a final order of removal.[149] The government further argued that because the underlying order of removal was final, Guerra was being held pursuant to 8 U.S.C. § 1231 and was thus not entitled to a bond hearing.[150]

In *Guerra I* and *Guerra II*, the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit, respectively, held that individuals who are subject to reinstated orders of removal but have ongoing withholding-of-removal proceedings are entitled to bond hearings.[151] The *Guerra* courts identified that the question before them was whether an order of removal that was reinstated against an indi-

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[142] *See infra* notes 146–160 and accompanying text.

[143] *See infra* notes 161–169 and accompanying text.

[144] *See infra* notes 170–179 and accompanying text.

[145] *See infra* notes 180–184 and accompanying text.

[146] *See* Petitioner-Appellee's Brief, *Guerra II*, *supra* note 4, at 7–8 (noting that "the government repeatedly refused to consider evidence to release Guerra on bond").

[147] Guerra v. Shanahan (*Guerra I*), 2014 WL 7330449, at *1 (S.D.N.Y. 2014); *see Guerra II*, 831 F.3d at 61 (indicating that Guerra argued his detention violated due process, which if found by the court would have required his release).

[148] *See Guerra I*, 2014 WL 7330449, at *3 ("Guerra thus asserts that his detention is governed by 8 U.S.C. § 1226(a), and that he is therefore entitled to a bond hearing.").

[149] *See id.* (noting the government's argument that reinstated orders or removal are administratively final "because such an order 'is not subject to being reopened or reviewed'").

[150] *See id.* (detailing the government's proposed conclusion that Guerra was detained under 8 U.S.C. § 1231).

[151] *Guerra II*, 831 F.3d at 61; *Guerra I*, 2014 WL 7330449, at *1.

vidual with a pending application for withholding of removal was administratively final.[152] The courts noted that if such reinstated orders of removal were administratively final, then individuals subject to those orders were detained pursuant to 8 U.S.C. § 1231 and are therefore not entitled to a bond hearing.[153]

In reaching its conclusion, the Second Circuit examined the language of 8 U.S.C. § 1226(a) and noted that the statute applied to individuals awaiting a determination of actual removal, not just theoretical removability.[154] The court also reasoned that, while Guerra was clearly removable as a result of the reinstated removal order, his ongoing withholding proceedings sought to answer the question of whether he would actually be removed.[155] Because it was not clear that Guerra would actually be removed while his withholding proceedings were ongoing, the court held that the decision of whether Guerra was to be removed or not was still pending.[156] The Second Circuit also noted that, because 8 U.S.C. § 1231(a) focuses on detention in the context of the "removal period," the statute could not govern Guerra's detention because there was no way the Attorney General could remove him as required while his withholding application was pending.[157]

Both the courts noted that, although Guerra was not free to appeal his underlying removal order, he could appeal the outcome of his withholding-of-removal proceedings to the Board of Immigration Appeals.[158] Both courts also noted that, although the Second Circuit had not previously addressed the issue directly, precedent in the Circuit indicated that orders of removal should not be treated as administratively final during pending withholding-of-removal proceedings because courts in the Circuit had held that such decisions are not final

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[152] *Guerra II*, 831 F.3d at 62; *Guerra I*, 2014 WL 7330449, at *1.

[153] *See Guerra II*, 831 F.3d at 61 (noting that § 1231 "does not authorize bond hearings"); *Guerra I*, 2014 WL 7330449, at *2 (noting that Guerra would only be eligible for a bond hearing if he were detained under § 1226(a), which applies to detentions "before a removal order becomes administratively final").

[154] *See Guerra II*, 831 F.3d at 62 (noting that § 1226(a) does not address theoretical removability, but rather determination of actual removal). The court stated that because individuals in ongoing withholding proceedings could end up not being removed, they fell within the statutory scope of § 1226(a) rather than § 1231. *See id.* at 63 (quoting Chupina v. Holder, 570 F.3d 99, 103 (2d Cir. 2009)) (noting that, in the similar context of asylum, an application that is granted on remand "effectively would result in the cancellation of any order removing" an individual).

[155] *Id.* at 62.

[156] *See id.* at 63 (analogizing the similar context of asylum applications and noting that in the case of both asylum and withholding, an individual could be allowed to remain in the United States).

[157] *Id.* at 62–63 (citing 8 U.S.C. § 1231(a)). The text of 8 U.S.C. § 1231(a) provides that the Attorney General "*shall* remove" the individual during the removal period. 8 U.S.C. § 1231(a) (2012) (emphasis added).

[158] *Guerra I*, 2014 WL 7330449, at *3; *see Guerra II*, 831 F.3d at 63 (noting that the parties did not dispute that Guerra could appeal the outcome of his withholding claim). The district court noted the impact of finding reinstated orders of removal to be administratively final, stating that such a holding would "raise serious constitutional concerns." *Guerra I*, 2014 WL 7330449, at *4 (quoting Ortiz-Alfaro v. Holder, 694 F.3d 955, 958 (9th Cir. 2012)).

for purposes of appellate review.[159] The District Court also indicated that the majority of federal courts to address the issue held that reinstated orders of removal were not administratively final pending a withholding of removal application.[160]

B. The Ninth Circuit's Affirmance of the District of Idaho's Decision That Reinstated Orders of Removal are not Reviewable

Padilla-Ramirez also filed a habeas petition in federal court seeking a bond hearing and immediate release from custody after his requests for a bond hearing were denied.[161] Padilla-Ramirez also contended that he was being held pursuant to 8 U.S.C. § 1226(a), and was therefore entitled to a bond hearing.[162] The government again argued that because the underlying removal order could not be challenged, Padilla-Ramirez was being held pursuant to 8 U.S.C. § 1231, and was therefore not entitled to a bond hearing.[163]

Reaching the opposite conclusion as that of the Second Circuit, the United States District Court for the District of Idaho and the United States Court of Appeals for the Ninth Circuit held, in *Padilla-Ramirez I* and *Padilla-Ramirez II* respectively, that reinstated orders of removal are administratively final, notwithstanding a pending application for withholding of removal.[164] Like the *Guerra* courts, the *Padilla-Ramirez* courts identified the question before them as whether an order of removal that was reinstated against an individual with a

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[159] *Guerra II*, 831 F.3d at 63; *Guerra I*, 2014 WL 7330449, at *5. The courts noted that, in cases where individuals sought federal court review of an order of removal, the Second Circuit had previously determined that a pending withholding application prevented orders of removal from being final and thereby reviewable. *See Guerra II*, 831 F.3d at 63 (citing *Chupina*, 570 F.3d at 103) (reasoning that the finality required for judicial review is the same as that contemplated in 8 U.S.C. § 1231(a)); *Guerra I*, 2014 WL 7330449, at *5 (citing *Chupina*, 570 F.3d at 103–04) (noting the similarity between the finality required for judicial review and the finality required for a bond hearing). Although the government argued that the two types of finality were distinct, the Second Circuit did not create a difference in the finality required for judicial review of orders of removal, and the finality required under § 1231(a). *See Guerra II*, 831 F.3d at 63 (noting that the court would "not create new principles parsing administrative finality").

[160] *See Guerra I*, 2014 WL 7330449, at *4–5 (collecting federal court cases addressing the question). The District Court made note of *Ortiz-Alfaro*, observing that the Ninth Circuit came to the same conclusion as the courts in *Guerra I* and *Guerra II*. *Id.* at *4. At the time of the court's opinion in *Guerra I*, *Padilla-Ramirez v. Shanahan* had not yet been decided at the district court level. *Compare* Padilla-Ramirez v. Shanahan (*Padilla-Ramirez I*), 180 F. Supp. 3d 697, 697 (D. Idaho 2016) (noting decision date of April 15, 2016), *with Guerra I*, 2014 WL 7330449, at *1 (noting decision date of December 23, 2014).

[161] *Padilla-Ramirez II*, 882 F.3d at 829; *Padilla-Ramirez I*, 180 F. Supp. 3d at 698.

[162] *See Padilla-Ramirez II*, 882 F.3d at 829 ("Padilla-Ramirez argues that he is detained pursuant to 8 U.S.C. § 1226(a).").

[163] *See id.* ("[T]he government contends that Padilla-Ramirez is detained pursuant to 8 U.S.C. § 1231(a)."); *Guerra I*, 2017 WL 7330449, at *3 (noting the government's similar argument).

[164] *Guerra II*, 831 F.3d at 61; *Padilla-Ramirez I*, 108 F. Supp. 3d at 698; *see Padilla-Ramirez II*, 882 F.3d at 828 (affirming *Padilla-Ramirez I*).

pending application for withholding of removal was administratively final.[165] The courts also recognized that, if Padilla-Ramirez's reinstated order was administratively final, he would not have the right to a bond hearing.[166]

The *Padilla-Ramirez* courts began their analyses in the same way as the *Guerra* courts, by examining the language of the statutes at issue and determining that the language indicated that Padilla-Ramirez's detention was authorized pursuant to 8 U.S.C. § 1231 because, even if his withholding application succeeded, the government could simply remove him to a different country.[167] The courts spent much of their opinions distinguishing *Padilla-Ramirez* from Ninth-Circuit-precedent *Ortiz-Alfaro*, and explaining the distinction between administrative finality of the decision to remove an individual and the decision of which country the individual would be removed to.[168] The Ninth Circuit also directly addressed *Guerra II* and disagreed with almost all of the Second Circuit's analysis of both guiding precedent and the applicable statutes.[169]

C. District Courts' Approaches to the Finality of Reinstated Orders of Removal

Federal District Courts have come to differing conclusions when determining whether reinstated orders of removal are administratively final.[170] The

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[165] *Compare Padilla-Ramirez II*, 882 F.3d at 829–30 (identifying question before the court as whether Padilla-Ramirez was detained pursuant to § 1226(a) or § 1231), *and Padilla-Ramirez I*, 108 F. Supp. 3d at 699 (recognizing the same question as the "central issue" in the case), *with supra* note 152 and accompanying text (detailing the same question's recognition by the *Guerra* courts).

[166] *See Padilla-Ramirez II*, 882 F.3d at 829–30 (noting that if Padilla-Ramirez's order of removal was administratively final, his detention was governed by § 1231(a), and noting that individuals detained under § 1231(a) are not entitled to bond hearing); *Padilla-Ramirez I*, 108 F. Supp. 3d at 699–700 (noting that the difference between being detained under § 1226 and § 1231 effects "the kind of review process available to [the individual] if [that person] wishes to contest the necessity of . . . detention").

[167] *Padilla-Ramirez II*, 882 F.3d at 830–31; *see Padilla-Ramirez I*, 180 F. Supp. 3d at 701 (examining both statutes and reasoning that it "does not make sense" that Padilla-Ramirez's detention could be pursuant to § 1226(a)); *see also* 8 U.S.C. § 1231(b)(2)(E) (providing for the removal of individuals to countries other than those designated in their removal orders); 8 C.F.R. § 208.16(f) (2018) (noting that, in both withholding under § 1231 and withholding under the Convention Against Torture, the government is not prevented from "removing an [individual] to a third country other than the country to which removal has been withheld").

[168] *See Padilla-Ramirez II*, 882 F.3d at 833 (quoting *Ortiz-Alfaro*, 694 F.3d at 958) (noting that *Ortiz-Alfaro* only applied to finality for judicial review to avoid "serious constitutional concerns"); *Padilla-Ramirez I*, 180 F. Supp. 3d at 702 (noting that *Ortiz-Alfaro*'s holding was limited to finality "for purposes of judicial review").

[169] *See Padilla-Ramirez II*, 882 F.3d at 834–36 (disagreeing with the Second Circuit as to the purpose of withholding proceedings and the similarities between asylum claims and withholding applications, and disputing the alleged creation of "tiers of finality" by the Second Circuit's decision).

[170] *Compare* Crespin v. Evans, 256 F. Supp. 3d 641, 650–51 (E.D. Va. 2017) (holding that reinstated orders of removal are administratively final and that detention thereunder is therefore governed

ambiguous status of law on the issue of the finality of reinstated orders of removal has even led to differing conclusions by judges in the same federal judicial district.[171] Many courts addressing this question after *Guerra II* and *Padilla-Ramirez II* have relied on one of those circuit-level decisions as a guidepost for their own analysis.[172] Prior to *Guerra II* and *Padilla-Ramirez II*, courts addressing the issue of finality of reinstated orders of removal adopted one of two basic approaches to answering the question, which led to two differing conclusions.[173]

Courts that have concluded that reinstated orders of removal are administratively final utilized the same approach later employed by the courts in *Padilla-Ramirez I* and *Padilla-Ramirez II*.[174] Those courts reasoned that because the ongoing withholding-of-removal proceedings were not examinations of the underlying orders of removal, but rather considerations of the location of removal, the underlying order remained final.[175] Consequently, those courts held

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by § 1231), *and* Reyes v. Lynch, No. 15-CV-0442, 2015 WL 5081597, at *3–4 (D. Colo. Aug. 28, 2015) (coming to the same conclusion as the *Crespin* court), *with* Guerro v. Aviles, No. 14-CV-4367, 2014 WL 5502931, at *9 (D. N.J. Oct. 30, 2014) (determining that detention of an individual subject to a reinstated order of removal is governed by § 1226 because reinstated orders of removal are not final), *and* Pierre v. Sabol, No. 1:11-CV-2184, 2012 WL 1658293, at *4 (M.D. Pa. May 11, 2012) (reasoning that reinstated orders of removal are not administratively final).

[171] *Compare* Bucio-Fernandez v. Sabol, No. 1:17-CV-00195, 2017 WL 2619138, at *3 (M.D. Pa. June 16, 2017) (holding that reinstated orders of removal are administratively final and detention thereunder is governed by § 1231), *with* Rafael Ignacio v. Sabol, No. 1:CV-15-2423, 2016 WL 4988056, at *4 (M.D. Pa. Sept. 19, 2016) (holding that reinstated orders of removal are not administratively final and that detention thereunder is governed by § 1226), *and Pierre*, 2012 WL 1658293, at *4 (same).

[172] *See, e.g.*, Villalta v. Sessions, No. 17-CV-05390, 2017 WL 4355182, at *5 (N.D. Cal. Oct. 2, 2017) ("*Padilla-Ramirez* [*II*] establishes that Petitioner is being detained pursuant to 8 U.S.C. § 1231."); De Souza Neto v. Smith, 272 F. Supp. 3d 228, 230 (D. Mass. 2017) ("The Ninth Circuit holds, and this court agrees, that a reinstated removal order is 'administratively final.'"); *Rafael Ignacio*, 2016 WL 4988056, at *4 (reasoning that a reinstated order of removal was not administratively final, "agree[ing] with the [*Guerra II*] court's second reason, that the more logical source of authorization for the detention of [individuals] currently in withholding-only proceedings is section 1226(a)").

[173] *Compare Guerrero*, 2014 WL 5502931, at *4 (focusing on the availability of appeals from the denial of a withholding of removal application to determine that a reinstated removal order could not be final while a withholding application was pending), *with Reyes*, 2015 WL 5081597, at *3 (focusing on the fact that, even if a withholding application is successful, the individual can still be removed to a different country).

[174] *Compare Padilla-Ramirez II*, 882 F.3d at 832 (finding that a reinstated order of removal was final because, even if Padilla-Ramirez's withholding application succeeded, the government could simply remove him to a different country), *and Padilla-Ramirez I*, 180 F. Supp. 3d at 701–02 (reasoning that reinstated orders of removal are administratively final during withholding-of-removal proceedings because the underlying removal order is not subject to review), *with Reyes*, 2015 WL 5081597, at *3 (noting that the government could remove an individual to a different country even if that person's withholding application were successful).

[175] *Reyes*, 2015 WL 5081597, at *3. *Reyes* involved the detention, during withholding-only proceedings, of a Mexican national who had illegally re-entered the country and had an earlier order of removal reinstated. *Id.* at *1.

that detentions of individuals subject to such reinstated orders are governed by § 1231.[176] Conversely, courts that held that reinstated orders of removal are not final while there is a pending withholding of removal application employed the same approach later adopted by the *Guerra I* and *Guerra II* courts.[177] Those courts concluded that because individuals with ongoing withholding of removal applications could not be removed until after those applications were complete, they could not logically be in the removal period.[178] Because those courts reasoned that such individuals are not within the removal period, the courts concluded that the detention of those individuals could not be governed by § 1231 and must be governed by § 1226.[179]

D. The Number of Immigrants Currently Subject to Detention with Questionable Eligibility for Bond Hearings

The current split between the Second and Ninth Circuits and the related ambiguity in federal law as to whether reinstated orders of removal are final and non-reviewable has far-reaching implications for the individuals subjected to those orders.[180] Over one hundred and fifty thousand individuals in the United States are subject to reinstated orders of removal every year.[181] The split regarding the finality of those orders leaves some of those individuals without access to a bond hearing while affording others the protection of a

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[176] *Bucio-Fernandez*, 2017 WL 2619138, at *1, 3 (holding that the eleven-month detention of an individual in withholding-only proceedings was governed by § 1231 and that no bond hearing was required); *Reyes*, 2015 WL 5081597, at *6 (holding that the fourteen-month detention of an individual in withholding-only proceedings after the reinstatement of an order of removal, was governed by § 1231 and that the individual was not entitled to a bond hearing).

[177] *Compare Guerra II*, 831 F.3d at 62–64 (reasoning that reinstated orders of removal are not final while a withholding-of-removal application is pending because the individual subject to the reinstated order cannot be removed), *and Guerra I*, 2014 WL 7330449, at *3–5 (reasoning that reinstated orders of removal are not final, because individuals subject to reinstated orders can still seek review of their withholding applications), *with Rafael Ignacio*, 2016 WL 4988056, at *4 (determining that, because a petitioner's ongoing withholding-of-removal process sought to determine what country he would be removed to, his order of removal could not be final), *and Pierre*, 2012 WL 1658293, at *4 (holding that a reinstated order of removal could not be final while an application for withholding of removal was pending because there was still a pending decision as to whether the subject of that order would be removed from the United States).

[178] *Rafael Ignacio*, 2016 WL 4988056, at *4; *Pierre*, 2012 WL 1658293, at *4.

[179] *Rafael Ignacio*, 2016 WL 4988056, at *4 (holding that § 1226 governs an individual's detention during withholding-only proceedings related to a reinstated order of removal and that the individual is entitled to a bond hearing); *Pierre*, 2012 WL 1658293, at *4 (same).

[180] *See infra* notes 181–184 and accompanying text (detailing the number of individuals whose access to a bond hearing is currently on questionable footing, and the impact of the denial of a bond hearing).

[181] *See* Koh, *supra* note 43, at 203 n.117 (noting that the government reinstated 159,634 orders of removal in fiscal year 2013 alone).

bond hearing.[182] Because bond hearings are among the only ways for an individual to be released from detention, the location of a person's arrest can be the difference between more than two years in immigration detention or spending that time with family.[183] That result is particularly troubling because most individuals who reenter the United States after being removed have family ties to the country in the form of parents or children.[184]

III. Protecting Individuals Subject to Reinstated Orders of Removal Through Statutory Interpretation and Legislative Action

This Part discusses two possible solutions to the current circuit split and lack of clarity regarding the finality of reinstated orders of removal.[185] Section A argues that Congress should act to clarify this area of federal law, explicitly state that reinstated orders of removal are not final orders of removal, and safeguard the right to a bond hearing for individuals seeking protection in this country.[186] Section B argues that until Congress clarifies this area of federal law, future examining courts should recognize that reinstated orders of removal are not final orders of removal, as the Second Circuit properly concluded in *Guerra II*.[187]

A. The Need for Clear Congressional Action to Protect Those Rights

In light of the ambiguity in federal law that caused the split between the Second and Ninth Circuits, Congress should recognize that a reinstated order of removal is not a final order of removal when the individual who is subject to

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[182] *Compare Guerra I*, 2014 WL 7330449, at *1, 5 (recognizing that Guerra had the right to a bond hearing and requiring that it occur within thirteen days), *with Padilla-Ramirez I*, 180 F. Supp. 3d at 702–03 (denying Padilla-Ramirez a bond hearing and therefore requiring that he remain detained).

[183] *See Guerra II*, 831 F.3d at 61 (noting that on the date of the *Guerra II* decision, two years and five months after Guerra was detained by ICE, his withholding-of-removal proceedings were still ongoing); *Geographic Boundaries of United States Courts of Appeals and United States District Courts*, U.S. COURTS, http://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf [https://perma.cc/W3RX-NBLK] (detailing Nevada as part of the Ninth Circuit and New York as part of the Second Circuit). *Compare Padilla-Ramirez II*, 882 F.3d at 828 (denying the right to a bond hearing to individuals subject to reinstated orders of removal in the Ninth Circuit), *with Guerra II*, 831 F.3d at 61 (recognizing that individuals subject to reinstated orders of removal in the Second Circuit have the right to a bond hearing).

[184] *See* Koh, *supra* note 43, at 203 n.117 (noting that roughly sixty-seven percent of individuals who reentered the country illegally had older family members living in the United States at the time of their reentry, and fifty percent of reentering individuals had children living in the United States at that time).

[185] *See infra* notes 188–213 and accompanying text.

[186] *See infra* notes 188–199 and accompanying text.

[187] *See infra* notes 200–213 and accompanying text.

that order has an ongoing withholding proceeding.[188] Individuals in that situation are deserving of Congress's protection in the form of bond hearings, are currently often subjected to prolonged detention, and are at very low risk of absconding during their withholding proceedings.[189]

Individuals in the position of Guerra and Padilla-Ramirez are deserving of Congressional protection for three basic reasons.[190] First, those individuals have, at the least, articulated a reasonable fear of removal to the country in their order of removal.[191] Second, they are merely trying to avoid deportation to a potentially dangerous environment.[192] Finally, most individuals subject to reinstated orders of removal have family ties to the United States, and their continued detention risks serious consequences for those family members.[193]

Without Congressional action, individuals could be subjected to prolonged detention.[194] This result is especially troubling because these individu-

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[188] *See* Padilla-Ramirez v. Bible (*Padilla-Ramirez II*), 882 F.3d 826, 828 (9th Cir. 2017) (denying the right to a bond hearing to individuals subject to reinstated orders of removal in the Ninth Circuit); Guerra v. Shanahan (*Guerra II*), 831 F.3d 59, 61 (2d Cir. 2016) (recognizing that individuals subject to reinstated orders of removal in the Second Circuit have the right to a bond hearing), *aff'g* Guerra v. Shanahan (*Guerra I*), No. 14-CV-4203, 2014 WL 7330449, at *4 (S.D.N.Y. Dec. 23, 2014); MICHAEL SCAPERLANDA, IMMIGRATION LAW: A PRIMER 5 (2009) (noting that immigration law, although implemented by the Executive Branch, is governed primarily by congressionally enacted statues, leaving the power to amend the governing law to Congress).

[189] *See infra* notes 191–199 and accompanying text (detailing reasons that individuals in withholding proceedings are deserving of the protections afforded by a bond hearing).

[190] *See* 8 C.F.R. § 208.31(e) (2018) (noting that all individuals in withholding-only proceedings have already articulated a reasonable fear of persecution or torture if removed to the country in the underlying removal order); McGarry, *supra* note 91, at 214 n.39 (detailing the result sought by individuals in withholding-of-removal proceedings); *see, e.g.*, Excerpts of Record, Volume I of II, *Padilla-Ramirez II*, *supra* note 18, at 14 (noting the negative impact of detention on detainees' families).

[191] *See* 8 C.F.R. § 208.31(e) (noting that, to have a withholding-of-removal case heard by an immigration judge, the individual requesting withholding of removal must state a reasonable fear of persecution or torture to an asylum officer).

[192] *See* McGarry, *supra* note 91, at 214 n.39 (noting that the positive result of withholding-of-removal proceedings is, at the least, an order preventing the government from removing an individual to the country stated in the order of removal). When an immigration judge grants an individual a bond hearing prior to the end of removal proceedings, the individual has a higher likelihood of success avoiding removal from the United States. *See What Happens When Individuals Are Released on Bond in Immigration Court Proceedings?*, TRAC IMMIGRATION (Sept. 14, 2016), http://trac.syr.edu/immigration/reports/438/ [https://perma.cc/Z4GE-7HGT] (noting that in 2015, sixty-eight percent of individuals granted bond successfully avoided removal).

[193] *See, e.g.*, Excerpts of Record, Volume I of II, *Padilla-Ramirez II*, *supra* note 18, at 14 (detailing the impact that Padilla-Ramirez's detention had on his family). For example, while the government held Padilla-Ramirez in detention, his eight-year-old son began to punch and kick himself, made statements indicating that he did not want to live anymore, and threw himself off a swing set after tying his arms in his jacket. *Id.* Meanwhile Padilla-Ramirez's six-year-old daughter experienced chest pains and outbursts at school, both of which were attributed to stress related to Padilla-Ramirez's detention. *Id.* at 15. Padilla-Ramirez's fifteen-year-old daughter also suffered a panic attack because of her father's detention. *Id.*

[194] *See, e.g.*, *Guerra II*, 831 F.3d at 61 (noting that the government detained Guerra for almost eleven months before the *Guerra I* court ordered the government to conduct a bond hearing). Alt-

als could end up being granted withholding of removal or asylum and allowed to remain in the United States.[195] As the system is interpreted in the Ninth Circuit today, individuals deserving of asylum could be detained for more than two years.[196]

Finally, individuals with pending withholding-of-removal proceedings are less likely to abscond while released on bond than others.[197] Part of the concern with releasing individuals on bond who are subject to final orders of removal is that those individuals have no incentive to return just to be deported.[198] Although there may be a lack of incentive to return for "regular" individuals faced with a final order of removal, individuals with pending applications for withholding of removal have every incentive to abide by the terms of bond release.[199]

B. Employing Statutory and Regulatory Interpretation to Safe-guard the Rights of Unauthorized Immigrants

Because the statutes currently enacted by Congress do not explicitly answer the question of whether reinstated orders of removal are final orders of removal, the questions presented in the *Guerra* and *Padilla-Ramirez* cases are likely to arise again.[200] Under the current statutory and regulatory framework

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hough Guerra's eleven-month detention ended with the *Guerra I* decision, had the district court denied him the right to a bond hearing, the government could have held him in detention for up to two and a half years because his withholding-of-removal proceedings were still ongoing at the time of the *Guerra II* decision. *Id.*

[195] *See* McGarry, *supra* note 91, at 214 n.39 (collecting authorities explaining the forms of relief available under withholding of removal and asylum).

[196] *See, e.g.*, *Guerra II*, 831 F.3d at 61 (noting that Guerra's withholding-of-removal proceedings were still ongoing over two years after ICE first detained him following his release by New York authorities).

[197] *See* TRAC IMMIGRATION, *supra* note 192 (noting that, in cases where individuals obtained release after a bond hearing, those individuals were roughly half as likely to abscond as individuals that the Attorney General voluntarily released without a bond hearing).

[198] *See id.* (responding to concerns about individuals not returning to face deportation after being released on bond); *see also* 8 U.S.C. § 1101(a)(47)(B)(i)–(ii) (2012) (noting that an order of removal becomes final when the Board of Immigration Appeals affirms the order or the period to request further appellate review expires).

[199] *See* TRAC IMMIGRATION, *supra* note 192 (noting that, even though the Attorney General refused to grant bond, individuals who secured release from immigration detention pursuant to an immigration judge's order were less likely to abscond while out on bond). Individuals facing reinstated orders of removal with ongoing withholding proceedings have even more reason to abide by the terms of their bond than individuals facing original removal actions, because those with ongoing withholding proceedings have at least crossed the first hurdle towards having their removal withheld by stating a reasonable fear of persecution or torture. *See* 8 C.F.R. § 208.31(e) (providing that, before an individual's withholding case is transferred to an immigration judge, the individual must satisfy an asylum officer that the individual has a reasonable fear of persecution or torture if returned to the country in the removal order).

[200] *See Padilla-Ramirez II*, 882 F.3d at 831 (noting that the "statutory definition of finality does not dictate a clear answer"); *see also Guerra II*, 831 F.3d at 62 (noting that the "various district courts

of immigration orders of removal, futures courts addressing the question of the finality of reinstated orders of removal should follow the Second Circuit's holding.[201] The language and structure that Congress employed in drafting § 1226 and § 1231—along with the need for judicial consistency—indicates that reinstated orders of removal should not be considered final orders of removal.[202]

Looking first to the language employed by Congress in § 1226, individuals with ongoing withholding-of-removal proceedings and a reinstated order of removal more appropriately fit within that statute.[203] Section 1226 speaks to detention "pending a decision on whether the [individual] is to be removed" or not.[204] Individuals in Guerra and Padilla-Ramirez's situation are still awaiting a decision as to whether they will be removed.[205] Individuals cannot be removed prior to the end of their withholding-of-removal proceedings, and it is more logical to conclude that a determination regarding their removal is still pending.[206] Unlike § 1226, § 1231 addresses detention during the removal period, a

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to have considered the issue have reached conflicting conclusions"); *In re* Korean Air Lines Disaster of Sept. 1, 1983, 829 F.2d 1171, 1176 (D.D.C. 1987) (Ginsburg, J.) (explaining the precedential value of circuit decisions within the circuit); *see, e.g.*, Villalta v. Sessions, No. 17-CV-05390, 2017 WL 4355182, at *5 (N.D. Cal. Oct. 2, 2017) (following the reasoning of *Padilla-Ramirez II*); de Souza Neto v. Smith, 272 F. Supp. 3d 228, 230 (D. Mass. 2017) (same); Rafael Ignacio v. Sabol, No. 1:CV-15-2423, 2016 WL 4988056, at *4 (M.D. Pa. Sept. 19, 2016) (adopting the reasoning of *Guerra II*).

[201] *See Guerra II*, 831 F.3d at 62–64 (analyzing the text of § 1226 and § 1231, the structure of those statutes, and other court decision explicitly or implicitly indicating that reinstated orders of removal are not final orders of removal).

[202] *See id.* at 63 (reasoning that there is no difference between finality for purposes of judicial review and purposes of immigrant detention); *Guerra I*, 2014 WL 7330449, at *4 (outlining the greater number of federal courts that have held that reinstated orders of removal are not final where withholding proceedings are pending). *Compare* 8 U.S.C. § 1226 (2012) (governing detention "pending a decision on whether [an individual] is to be removed from the United States"), *with id.* § 1231(a) (providing for detention of an individual "during the removal period").

[203] *See* 8 U.S.C. § 1231(b)(3) (providing that, notwithstanding an order of removal, "the Attorney General may not remove an [individual] to a country if the . . . [individual's] life or freedom would be threatened in that country"); *see also Guerra II*, 831 F.3d at 61 (recognizing that individuals subject to reinstated orders of removal are eligible for withholding-of-removal proceedings to determine whether they will be removed). *Compare* 8 U.S.C. § 1226 (providing for the detention of individuals "pending a decision on whether the [individual] is to be removed from the United States"), *with id.* § 1231(a) (providing for the detention of an individual "during the removal period," when "the Attorney General shall detain the [individual]" and "under no circumstance during the removal period shall the Attorney General release an [individual]").

[204] 8 U.S.C. § 1226 (authorizing detention of individuals "pending a decision on whether the [individual] is to be removed from the United States").

[205] *See* Padilla-Ramirez v. Bible (*Padilla-Ramirez I*), 180 F. Supp. 3d 697, 701 (D. Id. 2016) (noting that while an individual's withholding-of-removal proceedings are ongoing, the DHS is "restricted from removing" the individual that is the subject of those proceedings).

[206] *See Guerra I*, 2014 WL 7330449, at *4 (reasoning that because individuals with pending withholding proceedings have the right to appeal the outcome of those proceedings, their removal orders cannot be considered final).

time during which the Attorney General "shall" remove an individual.[207] Because individuals with pending withholding-of-removal proceedings cannot be removed, a statute that requires the Attorney General to remove individuals within a certain time should not be read to govern their detention.[208]

Judicial consistency also indicates that reinstated orders of removal should not be considered final orders of removal, in two distinct ways.[209] First, finding that reinstated orders of removal with pending withholding-of-removal claims are final would create inconsistent standards of finality for judicial review and immigrant detention.[210] Because a different standard of finality in immigration matters is not consistent with precedent on the issue, and would open the door to parsing finality in other areas of law, such a finding should be avoided.[211] Second, the majority of courts that have addressed the issue have held that in this situation, reinstated orders of removal are not final orders of removal.[212] In order to provide uniform rights to individuals subject to rein-

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[207] *Compare* 8 U.S.C. § 1226 (authorizing the Attorney General to detain individuals "pending a decision on whether the [individual] is to be removed from the United States"), *with id.* § 1231 (requiring the detention of individuals who an immigration judge has ordered removed and who "the Attorney General shall remove . . . from the United States" within ninety days).

[208] *See id.* § 1231 (requiring the detention of an individual who an immigration judge has ordered removed during the time when "the Attorney General shall remove" the individual); *Rafael Ignacio*, 2016 WL 4988056, at *4 (determining that a pending withholding claim, which prevented the Attorney General from removing an individual, also prevented the reinstated order of removal from becoming final); *Padilla-Ramirez I*, 180 F. Supp. 3d at 700 (noting that, during withholding-of-removal proceedings, the Attorney General cannot remove an individual pursuant to a reinstated order of removal); Pierre v. Sabol, No. 1:11-CV-2184, 2012 WL 1658293, at *4 (M.D. Pa. May 11, 2012) (recognizing that a reinstated order of removal could not be final while the Attorney General was not permitted to remove the individual identified in that order).

[209] *See Guerra II*, 831 F.3d at 63 (reasoning that there is no difference between finality for judicial review and finality for immigrant detention); *Guerra I*, 2014 WL 7330449, at *4 (outlining the greater number of federal courts that have held reinstated orders of removal are not final while withholding proceedings are pending).

[210] *See Guerra II*, 831 F.3d at 63 (rejecting the government's argument that finality for judicial review and finality for immigrant detention are distinct ideas).

[211] *See id.* (noting that no authority indicates a difference in finality for judicial review and immigrant detention, and that the court had "never recognized such 'tiers' of finality"). Throughout administrative law, a decision is final for purposes of judicial review when the agency's decision-making process is completed. *Id.* A decision creating two tiers of finality in the immigration context would undermine "principles of administrative law," potentially leading to the recognition of tiers of finality in other areas of administrative law. *See id.* Individuals in ongoing withholding proceedings are clearly still within the "agency's decisionmaking process" and therefore the agency decision cannot have reached finality. *Id.* (citing U.S. Army Corps of Eng'rs v. Hawkes Co., 136 S. Ct. 1807, 1813 (2016)).

[212] *See Guerra I*, 2014 WL 7330449, at *4 (citing Utlecht v. Napolitano, No. 8:12-CV-347, 2012 WL 5386618, at *2 (D. Neb. Nov. 1, 2012)) (holding that reinstated orders of removal are not final orders while withholding-of-removal proceedings are ongoing); Campos v. Napolitano, No. C 12-2682, 2012 WL 5379556, at *4 (N.D. Cal. Oct. 31, 2012) (same); *Pierre*, 2012 WL 1658293, at *4 (noting decisions from the United States District Courts for the District of Nebraska, the Northern District of California, and the Middle District of Pennsylvania stating that reinstated orders of removal are not final orders of removal).

stated orders of removal across the country, future courts to confront the issue should avoid exacerbating the split.[213]

CONCLUSION

The current circuit split and statutory ambiguity regarding the finality of reinstated orders of removal has far-reaching implications for the more than one hundred and fifty thousand unauthorized immigrants who reenter the United States after removal every year. Given that the current statutory and regulatory framework is ambiguous enough to cause the United States Courts of Appeals for the Second and Ninth Circuits to disagree on the finality of reinstated orders of removal in *Padilla-Ramirez II* and *Guerra II*, Congress should act. Congress should pass legislation explicitly stating that reinstated orders of removal are not final orders of removal while the individual subject to that order has a pending withholding of removal application. These individuals are deserving of Congress's protection because they have, at the very least, stated reasonable fears of returning to their home countries, are committed to lawfully remaining in the United States, and often have dependent family members remaining in the United States. Furthermore, the current lack of clarity regarding the finality of reinstated orders of removal could subject those individuals to prolonged detention, only for them to later receive asylum or other relief from removal. Unless and until Congress takes such action, future courts should employ the analysis used by the United States Court of Appeals for the Second Circuit and hold that reinstated orders of removal are not final orders of removal. The Second Circuit's reasoning, embodied in its decision in *Guerra II*, is more faithful to the text of the governing law, the surrounding statutory framework, and the consistent application of law across the country.

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[213] Compare *Padilla-Ramirez II*, 882 F.3d at 836 (finding reinstated orders of removal to be final orders of removal, thus depriving individuals subject to those orders of the right to a bond hearing), *with Guerra II*, 831 F.3d at 64 (finding reinstated orders of removal not to be final orders of removal, thus allowing individuals subject to such orders access to a bond hearing). The current split between the United States Courts of Appeals for the Second Circuit and the Ninth Circuit provides one set of rights to individuals facing reinstated orders of removal in California and another set of rights to individuals facing the same thing in Connecticut. *See In re Korean Air Lines Disaster*, 829 F.2d at 1176 (noting that circuit court precedent is binding on all district courts in the circuit). *Compare* Villalta v. Sessions, No. 17-CV-05390, 2017 WL 4355182, at *5 (N.D. Cal. Oct. 2, 2017) (relying on Padilla-Ramirez II to conclude that reinstated orders of removal were final, even with a pending withholding claim), *with* Enoh v. Sessions, 236 F. Supp. 3d 787, 793–94 (W.D.N.Y. 2017) (noting the fact that the Second Circuit had previously determined that reinstated orders of removal were not final pending a withholding claim).